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## What if the Big Bad Wolf in All Those Fairy Tales Was Just Misunderstood?: Techniques for Maintaining Narrative Rationality While Altering Stock Stories That Are Harmful to Your Client's Case

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# What if the Big Bad Wolf in All Those Fairy Tales Was Just Misunderstood?: Techniques for Maintaining Narrative Rationality While Altering Stock Stories That Are Harmful to Your Client's Case

by  
JENNIFER SHEPPARD\*

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## I. Introduction

*Those who do not have power over the story that dominates their lives, the power to retell it, rethink it, deconstruct it, joke about it, and change it as times change, truly are powerless, because they cannot think new thoughts.*

—Salman Rushdie

Cognitive research reveals that humans structure and understand experiences in narrative form.<sup>1</sup> What this means is that we force facts into a story so that we can understand what happened, what will happen, as well as to decide what to think of what happened and will happen. The primary tool used to accomplish this is a stock story. Humans view the world through stock stories,<sup>2</sup> which allow us to interpret and comprehend everyday events based on the minimal facts with which we are provided, without constantly having to analyze or question what we are doing.<sup>3</sup> Stock stories allow us to make decisions based on minimal facts because they supplement those facts with assumptions about how the world works and how the current events should play out. As a consequence, stock stories provide an interpretive framework for comprehending the significance of new circumstances, guiding an individual's interpretation of what happened, and shaping that individual's judgment regarding what should happen in the future.

Since stories function as a cognitive shortcut that supplements facts in a given situation and incorporate the dominant values in a given society,<sup>4</sup> a lawyer who relies only on analytical reasoning will not be as effective in persuading a legal audience as the lawyer who

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1. Jennifer Sheppard, *Once Upon a Time, Happily Ever After, and in a Galaxy Far, Far Away: Using Narrative to Fill the Cognitive Gap Left by Overreliance on Pure Logic in Appellate Briefs and Motion Memoranda*, 46 WILLAMETTE L. REV. 255, 257 (2009); Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681, 717 (1994); Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1, 3 (1984); Brian J. Foley, *Applied Legal Storytelling, Politics, and Factual Realism*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 17, 55 (2008).

2. Lopez, *supra* note 1, at 3.

3. *Id.*

4. *Id.* at 10.

incorporates stories into his or her strategy.<sup>5</sup> Lawyers are trained to value logical argumentation; laypersons are not.<sup>6</sup> Consequently, narrative is a powerful tool for persuasion.<sup>7</sup> Therefore, in order to persuade a legal audience, whether it is a judge or jury, a lawyer must be able to identify the potential stock stories that may be triggered by the facts of a client's case and avoid harmful stock stories and the unfavorable embedded knowledge structures associated with them.<sup>8</sup> The lawyer must be able to couch the client's story in terms of a favorable stock story or, at least, manipulate the elements of the new story in a way that circumvents the unfavorable aspects of the stock story. But what makes one narrative more persuasive or believable to an audience than another?

When choosing among multiple stories, credibility judgments are based on normative rationality.<sup>9</sup> To enjoy narrative rationality, a story must seem plausible.<sup>10</sup> Narrative rationality is comprised of several threads that work together to weave a plausible story. The first thread, narrative coherence, requires not only that a story be complete but also internally consistent.<sup>11</sup> It focuses on making sure that the internal elements of the story (such as factual reconstruction, character, setting, plot, etc.) make sense when viewed as a whole<sup>12</sup> and that the story and the evidence presented match up.<sup>13</sup> The second thread of narrative rationality is narrative correspondence. Narrative correspondence requires that the structural elements of the story told by the lawyer match up with the structural elements of a stock story. Therefore, if a story is congruent with the stock story, it triggers the

5. Steven J. Johansen, *This Is Not the Whole Truth: The Ethics of Telling Stories to Clients*, 38 ARIZ. ST. L.J. 961, 980 (2006) (hereinafter Johansen, *This Is Not the Whole Truth*).

6. *Id.*

7. Sheppard, *supra* note 1, at 267; Foley, *supra* note 1, at 40.

8. Sheppard, *supra* note 1, at 296.

9. Elizabeth Fagans & Mary R. Falk, *Untold Stories: Restoring Narrative to Pleading Practice*, 15 LEGAL WRITING: J. LEG. WRITING INST. 3, 20 (2009); Steven J. Johansen, *Was Colonel Sanders a Terrorist?: An Essay on the Ethical Limits of Applied Legal Storytelling*, 7 J. OF THE ASS'N. OF LEG. WRITING DIRECTORS 63, 64 (2010) (hereinafter Johansen, *Was Colonel Sanders a Terrorist?*).

10. BERNARD JACKSON, LAW, FACT AND NARRATIVE COHERENCE 11 (1988).

11. J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 53, 64 (2008); Fagans & Falk, *supra* note 9, at 20.

12. Jonathan Yovel, *Running Backs, Wolves, and Other Fatalities: How Manipulations of Narrative Coherence in Legal Opinions Marginalize Violent Death*, 16 LAW & LIT. 127, 131 (2004).

13. Fagans & Falk, *supra* note 9, at 20; Rideout, *supra* note 11, at 64.

contextual presuppositions held by the audience and will seem plausible and persuasive.<sup>14</sup> The third thread of narrative rationality is narrative fidelity. Narrative fidelity concerns whether the substance of the story comports with the embedded knowledge provided by the stock story that it triggers.<sup>15</sup> Fidelity focuses on whether the story accurately portrays social reality and satisfies the audience's expectations regarding how the story should play out.<sup>16</sup>

When a stock story is so pervasive that it will not allow a lawyer to ignore it, or a more favorable alternative story does not exist, a lawyer can present the client's story from an alternative perspective that will not evoke the embedded knowledge structures triggered by the unfavorable stock story.<sup>17</sup> The lawyer can accomplish this by tinkering with the different threads of narrative rationality to improve the persuasiveness of the story he or she tells. In this article, I will suggest that the principles of narrative coherence, correspondence, and fidelity can help the lawyer whose client does not fit comfortably within one of our culture's stock stories (e.g., the big bad wolf who wasn't really bad). Specifically, the lawyer who limits the client's story to the facts leading to the litigation focuses on the persuasive power of narrative coherence by ensuring that the story is plausible, as all aspects of it mesh with one another. On the other hand, the lawyer who shifts from a narrow to a broader view of a case will rely on the persuasive power of narrative correspondence by mapping a cultural myth onto his or her client's story. Finally, by creating friction between the client's character and the outcome associated with a stock story, the lawyer can draw on the persuasive power of narrative fidelity and shift the reader's expectations about how things should turn out.

## II. Why Narrative Frameworks are Necessary for More Effective Persuasion

Cognitive researchers have discovered that human perception and cognition require interpretive frameworks on which to construct

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14. Rideout, *supra* note 1, at 67; Yovel, *supra* note 12, at 131.

15. WALTER R. FISHER, HUMAN COMMUNICATION AS NARRATION: TOWARD A PHILOSOPHY OF REASON, VALUE AND ACTION 105 (1989); Rideout, *supra* note 12, at 70.

16. Johansen, *This is Not the Whole Truth*, *supra* note 5, at 982; Rideout, *supra* note 11, at 70 (quoting FISHER, *supra* note 15, at 64).

17. Sheppard, *supra* note 1, at 267; Linda Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative And Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISC. L.J. 259, 299-300 (2009).

meaning and reality.<sup>18</sup> Hence, humans comprehend new experiences by fitting them into interpretive frameworks called schemas.<sup>19</sup> Schemas are cognitive frameworks that contain and organize an individual's expectations and understanding of the world.<sup>20</sup> Schemas allow an individual to assess new situations and ideas without having to interpret them anew<sup>21</sup> and prevent an individual from having to expend cognitive energy to

map out inferences and relationships for every new situation.<sup>22</sup> Thus, schemas are cognitive shortcuts that convert new scenarios into events that are within an individual's scope of experience<sup>23</sup> because they 'help an individual understand people, events, objects, and their relationships to each other in a way that is meaningful 'based on what [that individual has] come to believe is natural through experience within a particular culture.'<sup>24</sup>

An individual requires more information than that supplied by an unfamiliar situation to construct the meaning of that new situation.<sup>25</sup> Schemas offer this additional information because they tap into an individual's inherent knowledge and provide an explanation that goes beyond the information that is currently before the individual.<sup>26</sup> Therefore, schemas are constantly, and unconsciously, shaping an

18. Sheppard, *supra* note 1, at 259; Sherwin, *supra* note 1, at 717.

19. Sheppard, *supra* note 1, at 259; Clive Baldwin, *Who Needs Facts When You've Got Narrative? The Case of P, C & S v. United Kingdom*, 18 INT'L J. SEMIOTICS L. 217, 236 (2005); Berger, *supra* note 17, at 264.

20. Ronald Chen and Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103, 1133 (2004) (quoting MARTHA AUGOSTINOS & IAIN WALKER, *SOCIAL COGNITION: AN INTEGRATED INTRODUCTION* 34 (1995)).

21. Sherwin, *supra* note 1, at 700; Berger, *supra* note 17, at 265.

22. Sheppard, *supra* note 1, at 259 (quoting Berger, *supra* note 17, at 265).

23. *Id.*; Berger, *supra* note 17, at 265.

24. Sheppard, *supra* note 1, at 259 (quoting Berger, *supra* note 17, at 265).

25. *Id.* at 260; Sherwin, *supra* note 1, at 700–01.

26. Sheppard, *supra* note 1, at 260; Sherwin, *supra* note 1, at 701. For example, it is not problematic when we are told that John went to a party and woke up the next morning with a headache, though no explanation is given as to why John had a headache the morning after a party, this is not a problem. Sherwin, *supra* note 1, at 700. A schema will provide an explanation for these events: it is commonly known that people drink too much alcohol at parties and feel hungover the next morning. *Id.* at 700.

individual's perception of new situations and affecting what he or she sees, thinks, and feels.<sup>27</sup>

A narrative, or story, functions as a cognitive framework where multiple schemas are operating at once.<sup>28</sup> Humans comprehend concepts expressed in terms of narratives better than those expressed as abstract principles.<sup>29</sup> Thus, narratives are crucial to an individual's ability to comprehend a series of chronological events.<sup>30</sup> As a consequence, humans are predisposed to arrange experiences in story form.<sup>31</sup> In fact, narratives are an inherent way for humans to make sense of their experiences.<sup>32</sup>

A stock story, which is sometimes referred to as a myth,<sup>33</sup> is a mechanism by which the members of a culture can interpret certain experiences<sup>34</sup> and give them social meaning.<sup>35</sup> Stock stories accomplish this by functioning as a template for a wide variety of similar stories to follow.<sup>36</sup> This template supplies the individual with the ordinary course of events and allows the individual to predict the outcome.<sup>37</sup> Also, stock stories cast people in particular roles that serve as templates for the characters that we may encounter in a given situation.<sup>38</sup> Thus, stock stories serve as recipes that allow individuals to predict the types of characters they might come in contact with in a particular situation, what will happen during the course of that particular situation, and what they will need to do in response to

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27. Sheppard, *supra* note 1, at 260; Sherwin, *supra* note 1, at 700, 717; Berger, *supra* note 17, at 262, 266.

28. Sheppard, *supra* note 1, at 260.

29. *Id.* at 261.

30. Berger, *supra* note 17, at 266; ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 30–31 (2000).

31. JEROME BRUNER, ACTS OF MEANING 45 (1990); ROBERT P. BURNS, A THEORY OF THE TRIAL 159 (1999); Rideout, *supra* note 11, at 57.

32. Sheppard, *supra* note 1, at 257, 261.

33. Linda H. Edwards, *Once Upon a Time in Law: Myth, Metaphor and Authority*, 77 TENN. L. REV. 883, 889 (2010). Stock stories are also called “master stories,” “meta-stories,” “scripts,” and “archetypes.” *Id.*; Berger, *supra* note 17, at 268; Foley, *supra* note 1, at 40; Rideout, *supra* note 11, at 59.

34. Sheppard, *supra* note 1, at 261; Berger, *supra* note 18, at 268; Judith Olans Brown et al., *The Mythogenesis of Gender: Judicial Images of Women in Paid and Unpaid Labor*, 6 UCLA WOMEN'S L.J. 457, 457–58 (1996).

35. Rideout, *supra* note 11, at 59.

36. Sheppard, *supra* note 1, at 261; STEVEN L. WINTER, A CLEARING IN THE FOREST: LAW, LIFE, AND MIND 106–13 (2003); Steven L. Winter, *Making the Familiar Conventional Again*, 99 MICH. L. REV. 1607, 1629 (2001); Berger, *supra* note 17, at 268.

37. Berger, *supra* note 17, at 268; AMSTERDAM & BRUNER, *supra* note 30, at 17.

38. Sheppard, *supra* note 1, at 262; Edwards, *supra* note 33, at 890.

those particular circumstances.<sup>39</sup> Furthermore, stock stories provide a social evaluation of the events that occur. As a result, once a stock story has been triggered, the individual's judgments will be based on assumptions derived from the social knowledge embedded in that story rather than on the unique characteristics of the current situation.<sup>40</sup> Furthermore, the outcome suggested by the stock story will seem to be the natural result of the events that preceded it.<sup>41</sup> Once the biasing effects of the stock story have been triggered, the only way to change the individual's mind is to present the individual with evidence that is inconsistent with the expectations or inferences created by the interpretive framework.<sup>42</sup>

Because stock stories perform an essential role in forming an individual's judgments about the outcome of a case, they serve an important part in the legal process.<sup>43</sup> As a result, stock stories can be a hazard for an unsuspecting lawyer since they operate subconsciously to free us from the need to think critically, reinforce traditional cultural views, guide our judgments and evaluations in new situations, and make certain preordained outcomes seem inevitable.<sup>44</sup> Consequently, lawyers must be able to recognize when the facts of their client's case trigger one or more stock stories.<sup>45</sup> They must also

39. Sheppard, *supra* note 1, at 262; Berger, *supra* note 17, at 266.

40. Sheppard, *supra* note 1, at 263.

41. *Id.*

42. *Id.*; Chen & Hanson, *supra* note 20, at 1229–30.

43. Sheppard, *supra* note 1, at 264; Rideout, *supra* note 11, at 54.

44. Sheppard, *supra* note 1, at 265 (footnote omitted).

45. *Id.*; Berger, *supra* note 17, at 305; Edwards, *supra* note 33, at 884, 891.

A particular set of circumstances often will trigger more than one potential stock story. A particular situation

is not always understood as “like” only one or a limited number of stock structures. . . . [A situation] often takes on new and important meaning when matched with a seemingly unrelated stock structure. [For example,] [m]uch was learned about dolphins by comparing them to humans and not just to sharks.

To accommodate this open-endedness, [an individual] employs a system of qualifiers. Qualifiers demonstrate the likeness of a happening and a stock structure both by admitting the imperfection of the match and at the same time by insisting strenuously (though often implicitly) on the significant similarity.

Lopez, *supra* note 1, at 17–18. Individuals process new events by “comparing and contrasting [them] with his available stock structures—by making likeness judgments. ‘This . . . [new event] is like ‘that’ stock structure if a limited number of representative features of the [event] parallel closely enough [for the individual’s] purposes features of the stock story.’” *Id.* at 16. Thus,



be aware of the potentially harmful effects that some stories may have on their client's case, and be able to find an alternative story that reinforces views favorable to the client or manipulate the structure of their client's story to avoid those harmful effects.<sup>46</sup>

### III. How to Work with Stock Stories to Make your Client's Story More Persuasive than the Competing Story of the Opposing Party

How stories are framed is extremely important to the success of a lawyer's case.<sup>47</sup> And given that "different legal consequences can follow from the choice of one story rather than another,"<sup>48</sup> it is critical that lawyers select the story that is most beneficial to their client's case. Thus, to be an effective advocate, a lawyer must recognize the stock stories that the facts of their client's case may trigger<sup>49</sup> and also recognize the potentially harmful effects that some of those stories may have on their client's case.<sup>50</sup> Furthermore, "if one possible stock story will further an outmoded cultural view harmful to the client's case," the lawyer must "successfully match the client's story to an alternative story that reinforces views beneficial to the client."<sup>51</sup>

In the event that a suitable alternative stock story is not available, a lawyer must present the client's story from an alternative perspective that will not evoke the embedded knowledge structures triggered by the unfavorable stock story.<sup>52</sup> The lawyer must tell a

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[i]f [an individual's] thought processes were monitored as he assimilated into stock structures what goes on in [a situation], [he or she] would encounter variations of the following theme: "This happening is *essentially* like that stock structure." "This happening is *nearly* like that stock structure." "This happening is *loosely speaking* like that stock structure." "This happening is in an *odd sense* like that stock structure." . . . In this sense, qualifiers compose a system of likeness statements that allow [an individual] flexibility in determining whether features of "what is" match features of a stock structure closely enough to allow "what is" to be comprehended and organized.

*Id.* at 17–18.

46. Sheppard, *supra* note 1, at 265; Edwards, *supra* note 33, at 884, 891.

47. Kim Lane Scheppel, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2085 (1989).

48. *Id.*

49. Sheppard, *supra* note 1, at 265; Berger, *supra* note 17, at 305; Edwards, *supra* note 33, at 884.

50. Sheppard, *supra* note 1, at 265; Edwards, *supra* note 33, at 2.

51. Sheppard, *supra* note 1, at 265.

52. *Id.* at 267; Berger, *supra* note 17, at 299–300.

“counterstory.”<sup>53</sup> A counterstory “‘may overcome the mind’s natural tendency to take [cognitive] shortcuts’ that transform unfamiliar situations into events that are within an individual’s range of experience”<sup>54</sup> because they present the client’s circumstances from a new perspective.<sup>55</sup> Thus, counterstories can reveal a new or different reality, “showing us that there are possibilities for life other than the ones we live . . . .”<sup>56</sup> To avoid unfavorable embedded knowledge structures, counterstories use techniques that short-circuit the inherent structure and understanding that is provided by stock stories.<sup>57</sup> Counterstories present the information anew—they move from the original view of the story to one that is more narrow or more expansive, present contradictory information that creates friction between the original story and the outcome that is not favorable to your client, present facts out of context, tell the story from a contrarian viewpoint, or create a new label or category.<sup>58</sup>

When telling a counterstory because no suitable alternative stock story is available, a lawyer must remember that the story he or she tells on behalf of the client must be plausible to the audience.<sup>59</sup> The story must “make sense.”<sup>60</sup> To make sense, a story must unfold in a logical manner and the characters must act as we expect them to act.<sup>61</sup> Simply put, a story must match up with the audience’s understanding of how the world usually operates.<sup>62</sup> The lawyer must convince the audience that the events in the client’s story “could have happened that way.”<sup>63</sup> The story must be credible, more credible than the story told by the other party. So what makes one story more credible than another? Some narrative theorists believe that judgments about credibility are based on narrative rationality.<sup>64</sup>

53. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2414 (1989).

54. Sheppard, *supra* note 1, at 267 (quoting Berger, *supra* note 17, at 300).

55. Berger, *supra* note 17, at 300 (construing AMSTERDAM & BRUNER, *supra* note 30, at 1).

56. Delgado, *supra* note 53, at 2414; Sheppard, *supra* note 1, at 267.

57. Sheppard, *supra* note 1, at 267.

58. *Id.*; Berger, *supra* note 17, at 299–300.

59. Sheppard, *supra* note 1, at 268; Rideout, *supra* note 11, at 66.

60. Johansen, *Was Colonel Sanders a Terrorist?*, *supra* note 9, at 67.

61. *Id.*

62. Sheppard, *supra* note 1, at 268 (quoting Rideout, *supra* note 11, at 66).

63. Rideout, *supra* note 11, at 66 (quoting BURNS, *supra* note 31, at 168).

64. Fagans & Falk, *supra* note 9, at 20; Johansen, *Was Colonel Sanders a Terrorist?*, *supra* note 9, at 64.

### A. Narrative Rationality

It is important to note that the court is not concerned with the truth of the story—as it is not possible to measure truth in objective terms—but rather is concerned with the plausibility of the story.<sup>65</sup> Does the story ring true?<sup>66</sup> Thus, the story that is told and the way that story is told will have substantial impact on the perceived credibility of the story.<sup>67</sup> The story selected, the elements of the story (such as setting, plot, and character), and the amount of detail provided will all have a bearing on the audience's judgment about the story.<sup>68</sup> Additionally, the central events of a story must relate to each other in a coherent fashion to be credible.<sup>69</sup> Furthermore, some contextual detail, which may be irrelevant to the basic story line, must accompany those events in order to place them in a context that the audience can recognize.<sup>70</sup> What this means is that, to be persuasive, to resonate with the audience, a story must have narrative rationality.<sup>71</sup> The concept of narrative rationality is comprised of three aspects—

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65. JACKSON, *supra* note 10, at 11. Remember, stories do not have to be true to be believable. Johansen, *Was Colonel Sanders a Terrorist*, *supra* note 10, at 67. “Fiction can be believable, and the truth can seem implausible, or downright impossible.” *Id.* For example, in *Was Colonel Sanders a Terrorist?*, Steven Johansen relates a story that a cab driver shared with him during a tour of Northern Ireland. *Id.* at 66. According to the cab driver, Colonel Sanders was in Ireland during World War I, became ill, received medical care from a Protestant nurse, and as a result, became an ardent supporter of the Protestant cause and donated hundreds of thousands of dollars to the UDA, one of the most violent terrorist organizations in the Western world. *Id.* Johansen relates that he was surprised to learn this before the cab driver admitted that the story was not true, that he had told it to show that “[p]eople will believe anything if you tell a good story.” *Id.* at 67. Johansen posits that after hearing the cab driver's story, people, including himself, believe that Colonel Sanders “might have supported a terrorist organization even though the claim is completely false and contrary to everything they might have ever heard about Colonel Sanders” because “the story [made] sense. The characters acted as we would expect them to act [and t]he storyteller seemed credible.” *Id.*

66. JACKSON, *supra* note 10, at 11. Credibility is a function of the evidence as a whole, not a “matter of individual witnesses or individuals items of testimony.” *Id.*

67. Rideout, *supra* note 10, at 64 (quoting W. LANCE BENNETT & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE* 89 (1981)).

68. *Id.* (quoting BENNETT & FELDMAN, *supra* note 67, at 89 n.4).

69. JACKSON, *supra* note 10, at 11–12.

70. *Id.* Jackson notes that, while some level of detail is needed to provide context and believability, one should avoid providing so much detail that the basic storyline is submerged. *Id.*

71. Johansen, *Was Colonel Sanders a Terrorist?*, *supra* note 9, at 67–68. Again, it is important to keep in mind that “the persuasiveness of a story does not turn on its truth. It turns on its narrative rationality—its logical coherence, its correspondence to audience expectations.” *Id.* at 68.

narrative coherence, correspondence, and fidelity.<sup>72</sup> Stories that fail to persuade are lacking in one or more of these areas.

### 1. *Narrative Coherence*

Coherence<sup>73</sup> is the primary characteristic that provides legal narratives plausibility and credibility.<sup>74</sup> The more coherent the story, the more probable it will seem.<sup>75</sup> When faced with competing stories, an audience is persuaded less by “Bayesian probability calculi of discrete events”<sup>76</sup> than by the story that seems more probable.<sup>77</sup> This means that the audience is persuaded more effectively by a story when the “factual reconstruction, character reconstruction, and other objects of narration make sense in a more holistic, gestalt manner than that suggested by a body of doctrine preoccupied with technical ‘admissibility,’ ‘relevance,’ and ‘weight’ of information-bytes, which are principle concerns of the law of evidence.”<sup>78</sup> In order to have narrative coherence, a story must accomplish two things.<sup>79</sup> It must be internally consistent and it must be complete.<sup>80</sup>

First, legal storytelling demands internal consistency because the “full story, the ‘real’ story is seldom told.”<sup>81</sup> Adjudicators construct stories out of the story framework suggested by the lawyer and the evidence that has been presented.<sup>82</sup> Thus, for a story to have internal consistency, the various elements of the story must match up and the story framework and the evidence presented must fit together.<sup>83</sup> Constructing a story requires the audience to make inferences, and the audience can only make those inferences when the underlying story structure is internally consistent.<sup>84</sup> Therefore, the elements of

72. Fagans & Falk, *supra* note 9, at 20.

73. Narrative coherence is generally treated as a synonym for “narrative probability” when discussing the characteristics of narratives. Rideout, *supra* note 12, at 64.

74. Yovel, *supra* note 12, at 129; Rideout, *supra* note 11, at 64. Yovel notes that the need for coherence is “hardly a novel claim: the forebearer of all western treatises on literary theory—Aristotle’s *Poetics*, written in the fourth century b.c.e.—asserts the ‘unity of plot’ as a principal poetic postulate . . . [U]nity is . . . the narrative crux around which the action builds.” Yovel, *supra* note 12, at 129.

75. Rideout, *supra* note 11, at 64.

76. Yovel, *supra* note 12, at 131.

77. Rideout, *supra* note 11, at 64.

78. Yovel, *supra* note 12, at 131.

79. Rideout, *supra* note 11, at 64; Fagans & Falk, *supra* note 9, at 20.

80. Rideout, *supra* note 11, at 64; Fagans & Falk, *supra* note 9, at 20.

81. Rideout, *supra* note 11, at 64.

82. *Id.*

83. Fagans & Falk, *supra* note 9, at 20; Rideout, *supra* note 11, at 64.

84. Rideout, *supra* note 11, at 64–65.

the story must seem related to each other.<sup>85</sup> Further, the concept of internal consistency extends beyond the elements of the story themselves and includes consistency between the story framework provided by the lawyer and the evidence that has been presented.<sup>86</sup> If the elements of the story are consistent, and the story and the evidence are consistent, the story will be more likely seem true.<sup>87</sup> However, if the parts of the story or the story and the evidence contradict each other, the story will likely seem implausible.<sup>88</sup> The lack of internal consistency will impede the audience's ability to allow for relationships and connections between the story's parts; consequently, the story will seem implausible.<sup>89</sup>

Second, the story must be complete.<sup>90</sup> Even if a story is internally consistent, it will be unconvincing if it is incomplete.<sup>91</sup> Completeness measures whether sufficient facts are present to ground the inferences that the audience will need to make<sup>92</sup> and whether the parts of the story seem adequate when considered as a whole.<sup>93</sup> When making the inferential steps necessary to construct a story, the audience must rely on embedded knowledge structures, like stock stories, for guidance.<sup>94</sup> If the story structure fails to contain all the expected elements, then the audience's ability to reference embedded knowledge structures breaks down.<sup>95</sup>

In sum, a legal audience is more likely to find for a party who presents the facts as part of a coherent story rather than as a jumble of facts with nothing to bind them together.<sup>96</sup> The more coherent a story is, the more internal consistency and completeness it enjoys, the more persuasive the story will be. Additionally, a highly coherent

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85. *Id.* (emphasis added).

86. *Id.* at 65; Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 528 (1991).

87. Rideout, *supra* note 11, at 64–65.

88. *Id.* at 65.

89. *Id.*

90. Fagans & Falk, *supra* note 9, at 20; Rideout, *supra* note 11, at 64.

91. Rideout, *supra* note 11, at 65.

92. Fagans & Falk, *supra* note 9, at 20; Rideout, *supra* note 11, at 65; BENNETT & FELDMAN, *supra* note 67, at 44–45.

93. Rideout, *supra* note 11, at 64.

94. *Id.* at 65; BENNETT & FELDMAN, *supra* note 67, at 44–45.

95. Rideout, *supra* note 12, at 65; BENNETT & FELDMAN, *supra* note 67, at 44–45; Pennington & Hastie, *supra* note 86, at 528.

96. Rideout, *supra* note 11, at 66 (quoting Richard Lempert, *Telling Tales in Court: Trial Procedure and the Story Model*, 13 CARDOZO L. REV. 559, 562 (1991)).

story will make it more likely that the audience will accept a party's story regardless of the "informational content of the evidence."<sup>97</sup>

## 2. *Narrative Correspondence*

Narrative correspondence, sometimes referred to as external narrative coherence,<sup>98</sup> also plays an important role in a story's plausibility and persuasiveness.<sup>99</sup> A story enjoys narrative correspondence when it satisfies the audience's sense that the events could have happened that way<sup>100</sup> and is congruent with what the audience knows typically happens in the world.<sup>101</sup> The audience's sense of what happens in the world is based on stock stories and the course of events that are inherently associated with them.<sup>102</sup>

The story must correspond to what "could" happen, or what "typically" happens, not to what actually happened. A decision-maker determines what "could" happen by relying on a cache of background knowledge provided by a set of stock stories rather than by undertaking an empirical assessment of actual events.<sup>103</sup>

Stock stories allow us to organize experiences, even in the presence of limited information, because they are unconscious cognitive frameworks that are automatically invoked to comprehend new information.<sup>104</sup> Additionally, stock stories are highly generalized to cover a broad range of factual situations.<sup>105</sup> They are not objective representations of reality, but rather are idealized representations that effectively characterize some, though not all, of the varied situations that humans confront in their day to day lives.<sup>106</sup> Once a lawyer has triggered a stock story, he or she may "tap[] into the

97. *Id.* (quoting Lempert, *supra* note 96, at 562).

98. Yovel, *supra* note 12, at 130; Rideout, *supra* note 11, at 67; JACKSON, *supra* note 11, at 58–59. Commentators refer to narrative correspondence as external narrative coherence because it "relies on relationships with something outside the trial story itself." Rideout, *supra* note 11, at 67.

99. Rideout, *supra* note 11, at 66.

100. *Id.* (quoting BURNS, *supra* note 31, at 168).

101. *Id.*

102. *Id.*; Fagans & Falk, *supra* note 9, at 20; BENNETT & FELDMAN, *supra* note 67, at 57. Thus, while narrative correspondence "may sound like a kind of reality check on the story being constructed at trial, . . . correspondence is structural, not referential or 'truth-based.'" Rideout, *supra* note 11, at 67.

103. *Id.*

104. Fagans & Falk, *supra* note 9, at 20–21.

105. *Id.*

106. *Id.* at 21.

‘stock’ information and combine[] it with ‘new information,’” to tell a more concrete story based on the particular facts of the client’s case.<sup>107</sup>

Narrative correspondence requires a comparison of the content of the story told by the lawyer with the content of other stories that form the audience’s pool of social knowledge.<sup>108</sup> Thus, a party’s story will seem plausible if it is congruent with the stock story it triggers and with the contextual presuppositions held by the audience.<sup>109</sup> When a story fits with what the audience knows of the world from stock stories, it has narrative correspondence, which makes the story more plausible and persuasive.

### 3. *Narrative Fidelity*

How does a legal audience decide between competing stories when both equally enjoy internal consistency, completeness, and correspondence?<sup>110</sup> According to Christopher Rideout, narrative fidelity is the deciding factor.<sup>111</sup> To possess narrative fidelity, the audience must entertain the notion that some outcomes are more legitimate than others.<sup>112</sup> Narrative fidelity is based on the audience’s personal evaluation of the plausibility of the story.<sup>113</sup> Consequently, fidelity “persuades the audience to make a comparative judgment about the competing narratives based not just on stock [stories] or abstract legal or moral principles, but on practical judgments about what the larger community would deem the right thing to do in the case.”<sup>114</sup> Thus, when a story has communal validity or relies on shared

107. *Id.*

108. Rideout, *supra* note 11, at 67 (quoting JACKSON, *supra* note 10, at 58–59).

109. *Id.*; JACKSON, *supra* note 10, at 58–59; Yovel, *supra* note 12, at 131. These contextual presuppositions include “connotations and associations invoked by the stock story, which supply the party’s story with meaning.” Yovel, *supra* note 12, at 130. Furthermore, it is important to remember that “[t]he narrative is plausible, and persuasive, to the extent that it bears a structural correspondence to one of these stock scripts or stories, not to the extent that it ‘really happened.’” Rideout, *supra* note 11, at 67.

110. Rideout, *supra* note 11, at 69.

111. *See id.* at 69–78.

112. Fagans & Falk, *supra* note 9, at 22 (quoting Steven L. Winter, *The Cognitive Dimension of the Agon between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2257 (1989)).

113. Johansen, *This Is Not the Whole Truth*, *supra* note 5, at 982.

114. Fagans & Falk, *supra* note 9, at 22. The audience’s practical judgment “grasps not the accurate objective characterization of a situation in theoretical terms but something far more difficult to describe.” Rideout, *supra* note 11, at 74. These practical judgments are a type of “intuition of experience” or “nonformal intelligence” that lead “many honest and sensible judgments . . . [to] express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions—impressions which

communal norms, it enjoys narrative fidelity and will be more persuasive than a story that does not possess that characteristic.<sup>115</sup> As a result, narrative fidelity relies on social values as much as it relies on reasoning.<sup>116</sup> Thus, while the audience may consider whether the facts presented by the lawyer are reliable and whether the conclusions drawn from them seem plausible, the story's fidelity is measured by the extent to which the story is consistent with the audience's expectations and experience.<sup>117</sup> The story will be more persuasive if it matches up with the audience's personal sense of how the events should unfold and how the story should end.<sup>118</sup> If the story has fidelity, the audience will instinctively want the client to receive justice.<sup>119</sup>

At first glance, narrative fidelity seems very similar to, if not the same as, narrative correspondence. Because a story must be consistent with the audience's expectations and experiences to have narrative fidelity, it seems as though narrative fidelity relies upon stock stories to transmit mental or social models of what happened and what should happen.<sup>120</sup> Narrative correspondence concerns whether the structural elements of the story (i.e., setting, plot, character, etc.) comport with the stock stories that have been triggered by the facts of the client's case.<sup>121</sup> Narrative fidelity, on the other hand, looks beyond whether the structural aspects of the story correspond with the stock story that has been triggered to whether the story accurately represents social reality and, therefore, provides a good basis for belief or action.<sup>122</sup> Thus, narrative fidelity assesses the substance of the story,<sup>123</sup> whereas narrative correspondence

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may lie beneath consciousness without losing their worth." BURNS, *supra* note 31, at 209–10 (quoting Justice Holmes in *Chicago, Burlington, & Quincy Ry v. Babcock*, 204 U.S. 585, 598 (1907)).

115. BURNS, *supra* note 31, at 217, 218; Rideout, *supra* note 11, at 74.

116. Johansen, *This Is Not the Whole Truth*, *supra* note 5, at 982; Rideout, *supra* note 11, at 77. Narrative fidelity has an evaluative component to it, which forces the audience to "make 'comparative judgment[s] about the relative importance of the norms that the two positions represent'" when deciding which competing narrative to accept. Rideout, *supra* note 11, at 73.

117. Johansen, *This Is Not the Whole Truth*, *supra* note 5, at 982.

118. Rideout, *supra* note 11, at 69 (quoting FISHER, *supra* note 15, at 64).

119. Fagans & Falk, *supra* note 9, at 22 (quoting Winter, *supra* note 36, at 2257).

120. Rideout, *supra* note 11, at 70.

121. *Id.* at 67.

122. FISHER, *supra* note 15, at 105; Rideout, *supra* note 11, at 70.

123. Rideout, *supra* note 11, at 70, 72. When "assessing the substantive worth of a story," the audience does so "not in terms of its appeal to abstract universals like the truth, and not in terms of its ability to translate into formal, logical propositions about social



matches the structural elements of the client's story with those of the stock story that has been triggered.<sup>124</sup>

In sum, a story possesses narrative fidelity when it comports with the audience's common sense.<sup>125</sup> Narrative fidelity is more than just the structural matching of the parts of the client's story with the structural aspects of the stock story. It is a consideration of whether the *substance* of the story comports with what the audience knows of the world based on the audience members' personal experience.

#### **IV. Techniques That May Suggest a Different, More Favorable Outcome for Your Client When Dealing With a Negative Stock Story**

As discussed previously, when a stock story that is not favorable to the client is triggered by the facts of the case, and a suitable alternative stock story is not available, a lawyer must tell a counterstory that presents the client's story from a different perspective. This new perspective must be one that will not evoke the unfavorable embedded knowledge structures triggered by the unfavorable stock story.<sup>126</sup> Counterstories use techniques that short-circuit the inherent structure, understanding, and evaluation that is provided by the stock story.<sup>127</sup> These techniques include moving from the initial view of the story to one that is more specific or more general, presenting contradictory information, taking facts out of context, or taking a contrarian view.<sup>128</sup>

Two of the techniques for circumventing a stock story will be examined in this section. These techniques include moving from the initial view of the case to one that is more specific or more general and presenting contradictory information. When a writer moves from a more specific view of the story to a more general one, or vice versa, he or she is manipulating narrative rationality by emphasizing either narrative coherence or narrative correspondence.<sup>129</sup> By emphasizing

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reality." *Id.* at 72. Rather, the audience bases its comparison on "a literally indescribable structure of norms, events, and possibilities for action." *Id.* at 74.

124. *Id.* at 70.

125. See BURNS, *supra* note 31, at 216; Rideout, *supra* note 11, at 75.

126. Sheppard, *supra* note 1, at 267; Berger, *supra* note 17, at 299–300; Delgado, *supra* note 53, at 2414.

127. Sheppard, *supra* note 1, at 267.

128. *Id.*; Berger, *supra* note 17, at 299–300.

129. See generally Yovel, *supra* note 12. Yovel refers to narrative coherence as "internal coherence" and narrative correspondence as "external coherence." See *id.* at 131.

one over the other, a writer can tell very different stories in the context of a single legal case.<sup>130</sup> With regard to presenting contradictory information, this section will focus on using characterization to make a different outcome from the negative one associated with the stock story seem not just legitimate, but natural.

**A. Manipulating Narrative Coherence and Narrative Correspondence to Tell a Story That is More Favorable to Your Client**

In order for a story to convince an audience, it must appeal to embedded knowledge structures, like stock stories and myths, shared by members of the same community.<sup>131</sup> But which culture's or class's stock stories are systematically imposed by the courts?<sup>132</sup> Whose conventions and values do we live by? Middle-class witnesses and parties typically offer testimony that can be translated into a conventional story form that is understood by the average white middle-class audience member.<sup>133</sup> On the other hand, members of subcultures, often referred to as "outsiders" by academics, often do not share the same cultural context as "insiders."<sup>134</sup> Outsiders have a different history, a different set of background experiences and a different set of understandings than "insiders."<sup>135</sup> As a result, when an outsider's actions are taken out of context, they often seem odd to insiders; the actions taken by the outsider are not the actions that the insider would have engaged in under similar circumstances.<sup>136</sup> In fact, an outsider's "failure to cast [his or her] viewpoint in the conventional imagery typically will result in [his or her] stories and arguments being treated as unintelligible if not unintelligent, the product of muddled thinking and an underdeveloped sense of justice."<sup>137</sup> Accordingly, outsiders regularly fail to provide evidence that an

130. *Id.* at 139.

131. The teller of the story and the members of the legal audience must share social knowledge. *See* JACKSON, *supra* note 10, at 69.

132. Lopez, *supra* note 1, at 37.

133. JACKSON, *supra* note 10, at 69.

134. *See* Scheppel, *supra* note 47, at 2096.

135. *Id.* Stated another way, some members of the legal audience (a juror or a judge) may not share with outsiders the "cognitive routines for presenting information in story-coded forms." JACKSON, *supra* note 10, at 68.

136. Scheppel, *supra* note 47, at 2096. This is the point at which "racial and other stereotypes enter the judgmental process. However, it is not generalized racial stereotypes which influence judgments, but rather racial stereotypes in relation to particular types of behavior, if and when such behavior is in issue within the story structure." JACKSON, *supra* note 10, at 69.

137. Lopez, *supra* note 1, at 49.

audience can translate into a conventional story.<sup>138</sup> Consequently, the outsider's inability to tell a conventional story may cause the audience to reject truthful accounts of the outsider's actions.<sup>139</sup> Furthermore, even stories that enjoy narrative coherence may be rejected by an audience if "the [story]teller and the audience do not share the norms, experiences, and assumptions necessary to draw connections among story elements."<sup>140</sup> As a result, outsiders may fear the court system and despair of receiving justice.<sup>141</sup>

An audience may find it hard to accept an outsider's story "without knowing more about how the situation fits into a context other than the 'obvious' insider's one."<sup>142</sup> Consequently, narrowing legal stories to just those particular events at issue will have a tendency to exclude much of the evidence that outsiders rely on to explain their points of view.<sup>143</sup> On the other hand, some outsiders' stories can be placed in a more sympathetic light if they are set in a broader context rather than beginning and ending with an account of "the trouble" as most legal narratives generally do.<sup>144</sup> By offering a wide-angle view of the social landscape in which the individual events occurred, the writer can provide the audience with the information necessary to better understand the actions of the outsider.<sup>145</sup> This phenomenon allows extremely different stories to be told based on seemingly identical facts that compete for persuasiveness by appealing more to either narrative coherence or narrative correspondence.<sup>146</sup> As a result, narrative coherence and narrative correspondence "may collide," as emphasizing one more than the other "generate[s] a distinct story . . . with little or no conjunction."<sup>147</sup>

When broadening the context in which the story is told to extend beyond the particular events of the litigation, a writer emphasizes narrative correspondence.<sup>148</sup> This broader context emphasizes narrative correspondence because correspondence relies on the embedded knowledge structures shared by members of a community.

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138. JACKSON, *supra* note 10, at 69.

139. *Id.* at 68.

140. *Id.*

141. Lopez, *supra* note 1, at 49.

142. Schepel, *supra* note 47, at 2096.

143. *Id.* at 2097.

144. *Id.* at 2096.

145. *Id.*

146. Yovel, *supra* note 12, at 139.

147. *Id.* at 138–39.

148. *Id.* at 133–34.

By presenting the story in a broader context, the writer hopes to tap into shared stock stories, myths, and experiences, or at the least, to present a context in which the insider can come to understand the outsider's actions. Further, by mapping the stock structure onto the structure of the client's story, the writer is attempting to tap into the persuasive power of the stock story. However, if a legal writer wishes to narrow the focus of the story to the particular facts of the case or to the facts relevant to the law, the writer should focus less on narrative correspondence and more on narrative coherence.<sup>149</sup> Whereas narrative correspondence evokes connotations and associations that supply the story with meaning, narrative coherence "works through culturally-entrenched notions of sequentiality, causation, and action to form the story's plot."<sup>150</sup> When focusing on narrative coherence rather than correspondence, a writer will provide a narrower context in which to view the facts of the case, focusing narrowly on the set of events that gave rise to the trouble in the case and "on what made those events happen."<sup>151</sup> No broader context will be given than that necessary to make sense of the story's events and to make the story seem plausible to the audience. The writer will focus on internal reconstructing the event and appealing to widely shared assumptions about how the world operates.<sup>152</sup>

Two examples of cases in which narrative coherence and correspondence were manipulated in order to relate very different stories are included below. The first case, *Rusk v. State*,<sup>153</sup> involves the appeal of a conviction for rape.<sup>154</sup> The second case, *Ze'ev v. State of Israel*,<sup>155</sup> concerns an appeal from an Israeli's conviction for the manslaughter of a Palestinian shepherd.<sup>156</sup>

#### 1. *Rusk v. State*

In *Rusk*, Eddie Rusk was convicted of raping a woman he had met at a bar, identified only as Pat, in 1977.<sup>157</sup> Pat gave Rusk a ride

149. *Id.* at 132.

150. *Id.* at 131.

151. Schepel, *supra* note 47, at 2095.

152. Yovel, *supra* note 12, at 132.

153. 406 A.2d 624 (Md. Ct. Spec. App. 1979).

154. *Id.* at 625.

155. CrimA 26/89 Ze'ev v. State of Israel 43 (4)PD 631 [1989] (Isr.).

156. Yovel, *supra* note 12, at 132 (discussing *Ze'ev v. State of Israel*, CrimA 26/89 Ze'ev v. State of Israel 43(4) PD 631 [1989] (Isr.)). The author has been unable to obtain a copy of the opinion. She has relied on Yovel's discussion and explanation of the case in her explanation of *Ze'ev*.

157. *Rusk*, 406 A.2d at 625.

home.<sup>158</sup> During the course of the rape, Pat verbally voiced her lack of consent, but she did not physically struggle.<sup>159</sup> On appeal, a majority of the Court of Special Appeals of Maryland reversed the conviction on the basis that the state had failed to present evidence that Rusk's behavior was sufficient to cause a reasonable fear that overcame Pat's ability to physically resist.<sup>160</sup> Judge Wilner dissented.<sup>161</sup>

The majority's technique when writing the legal narrative for *Rusk v. State* was fairly typical of legal opinions. The traditional legal narrative tends to emphasize narrative coherence, focusing primarily on the particular events surrounding the litigation and providing only those contextual facts needed to understand those outcome determinative facts. A traditional legal narrative begins by examining when the interaction between the parties began, traces the course of events that lead to the litigation, and ends when the parties part ways. Again, legal audiences tend to share white middle-class values and knowledge structures,<sup>162</sup> which work their way into opinions.

The story the majority told when relating the facts of the case focused narrowly on the events of the night that Pat claimed Rusk raped her.<sup>163</sup> The court ventured outside those bounds only to provide contextual information that added to the internal consistency of the story that the court related. The story began at the time and place that Pat and Rusk first became acquainted.<sup>164</sup> In the first paragraph of the facts, the majority explains that Pat was a twenty-two-year-old woman who was separated from her husband but not yet divorced.<sup>165</sup> It goes on to explain that Pat and one of her friends "went bar hopping" on the night in question and that Pat met Rusk at the third bar she attended.<sup>166</sup> The majority's story goes on to provide details regarding Pat and Rusk's interactions that evening, emphasizing facts that showed Pat's failure to struggle and characterizing Rusk's actions as lacking force.<sup>167</sup> The majority notes

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158. *Id.*

159. *Id.* at 625–26.

160. *Id.* at 628.

161. *Id.* at 629 (Wilner, J., dissenting).

162. See *supra* notes 115–116, and accompanying text.

163. Scheppel, *supra* note 47, at 2095.

164. *Id.*

165. *Rusk*, 406 A.2d at 625.

166. *Id.*

167. Scheppel, *supra* note 47, at 2095. Rather than characterizing Rusk's conduct as a "light choking," it would be characterized as a "heavy caressing." *Id.* at 2086; *Rusk*, 406 A.2d at 628.

that Rusk asked Pat for a ride home from the bar and that Pat agreed.<sup>168</sup> Pat initially refused Rusk's request that she come up to his apartment, but when Rusk took the keys out of the ignition, opened her car door and again asked her to come up, Pat told him she would, though she claimed to be scared of him.<sup>169</sup> Pat then followed Rusk into the boarding house, up the stairs, and into Rusk's apartment.<sup>170</sup> "When they got into [Rusk's] room, he said that he had to go to the bathroom and left the room for a few minutes. [Pat] made no attempt to leave. When [Rusk] came back . . . [Pat] took off her slacks and removed his clothing because 'he[ ] asked her to do it.'"<sup>171</sup> Pat stated that she was begging him not to rape her and that she was crying.<sup>172</sup> When she started to cry, Rusk put his hands on her throat and began to "lightly choke" her.<sup>173</sup> The court later noted that this light choke could have been "a heavy caress" based on statements made at oral argument.<sup>174</sup> The story ended when the two parted company for the night and Pat reported the rape to the police.<sup>175</sup>

Throughout the majority's opinion, the reader gets the sense that the judges just could not fathom Pat's lack of physical resistance if she really did not wish to consent to Rusk's advances. This makes sense given the Victorian taboos and myths that have traditionally surrounded rape,<sup>176</sup> as well as the fact that rape laws conform to the male experience of violence rather than to the female's experience of invasion, fear, and humiliation.<sup>177</sup> "The law expects a raped woman, like a battered wife, to behave like a man when threatened: to try to defend herself even at the risk of death. The law demands that a woman behave like a reasonable man and fight back."<sup>178</sup> Consequently, as most judges in 1979 tended to be men, "[i]t is probably hard for most men . . . to imagine not fighting back when attacked unless their passivity results from a weakness of will or a

168. *Rusk*, 406 A.2d at 625.

169. *Id.*

170. *Id.*

171. *Id.* at 625–26.

172. *Id.* at 626.

173. *Id.*

174. *Id.* at 628.

175. Scheppel, *supra* note 47, at 2095.

176. *Rusk*, 406 A.2d at 633 (1979) (Wilner, J., dissenting).

177. CAROL TAVRIS, *THE MISMEASURE OF WOMAN* 112 (1992).

178. *Id.* at 113. Rape laws do "not demand that a man behave like a reasonable woman and understand the difference between consent and coercion, between the words 'yes' and 'no.'" *Id.*

failure of nerve, neither of which are remediable in law.”<sup>179</sup> The social bias against rape victims and the judges’ inability to comprehend Pat’s lack of resistance meant that the court reversed Rusk’s conviction for rape. Essentially, the majority was unable to understand Pat’s motivation in not physically resisting Rusk.

Furthermore, because the judges were unable to comprehend Pat’s failure to struggle, they themselves struggled to make sense of the events of that night. In an effort to create internal consistency with regard to most of the events of the story, the majority includes the fact that Pat was separated from her husband but not yet divorced,<sup>180</sup> the relevance of which is unclear.<sup>181</sup> However, the next fact the majority mentions is that Pat and her friend were “bar hopping.”<sup>182</sup> When Pat’s marital status is considered with regard to the majority’s characterization of her behavior that night as “bar hopping,” its relevance becomes clear.<sup>183</sup> The combination of these two “facts” suggests Pat’s motivation that night by creating the “underlying suspicion, for which there is absolutely no support in the record, that Pat was somehow ‘on the make.’”<sup>184</sup> This “context” appeals to society’s widely held assumptions about how a woman trolling the bars looking for a man to bed behaves. This “context” shades the reader’s understanding of Pat’s subsequent actions in agreeing to give Rusk a ride home, following him up to his apartment, remaining in the apartment while he left the room, taking off her clothes at his request, and engaging in sexual acts. The fact that she was initially “on the make” causes Pat’s actions to appear consensual despite her repeated verbal objections.

The majority’s note that the testimony of two of Rusk’s friends “painted the episode in a manner more favorable to the accused”<sup>185</sup> is also designed to suggest that Pat was “on the make.” Why else would the majority make such a statement when it goes on to acknowledge that it need not recite the testimony of Rusk’s friends because the court was “obligated to view the evidence in the light most favorable

179. Scheppel, *supra* note 47, at 2096.

180. *Rusk*, 406 A.2d at 625.

181. *Id.* at 633 (Wilner, J., dissenting).

182. *Id.* at 625.

183. *Id.* at 632 (Wilner, J., dissenting).

184. *Id.*

185. *Id.* at 626. Presumably the evidence that favors Rusk’s version of the fact is that his friends observed him “walking down the street arm-in-arm” with a woman. *State v. Rusk*, 424 A.2d at 720, 723 (Md. 1981). One friend, David Carroll, testified that the woman “was hanging all over him.” *Id.* He also testified that he was “fairly certain” that the woman was Pat. *Id.*

to the prosecution”?<sup>186</sup> What need was there for the majority to make the initial statement? None, unless the majority was trying to create consistency between the facts of the case and its unstated version of what happened.

The dissenting judge, on the other hand, took a different approach. Rather than narrowly focusing on the trouble between Pat and Rusk, Judge Wilner put Pat and Rusk’s story in a broader context.<sup>187</sup> In addition to clarifying some of the facts presented by the majority and supplementing other facts regarding the events of the night in question, Judge Wilner zoomed out to provide a more expansive view of the case and offered a more panoramic opening shot of the social landscape in which this individual rape took place.<sup>188</sup> In an effort to allow the audience (which remember is primarily male) to understand Pat’s actions, the dissenting judge showed how the circumstances in which Pat found herself and her response were typical of women who are raped.

How did Judge Wilner make Pat’s circumstances seem characteristic of those experienced by rape victims? First, the judge noted that “[n]early half of [all] rapes occur *when this one did*, between 8:00 p.m. and 2:00 a.m.”<sup>189</sup> He also disclosed that “*as in [Pat’s] case*, approximately one-third of rape victims had come into contact with their assailant voluntarily.”<sup>190</sup> These statements address two often biasing facts in rape cases and implicitly suggest that it is normal for a woman, like Pat, to get raped late at night and for her to know her attacker.

Next, Judge Wilner addressed Pat’s failure to struggle. He began the discussion by revealing that law enforcement agencies throughout the country advise women not to fight back against their attackers because this increases the risk of serious bodily harm.<sup>191</sup> Additionally, the judge made it clear that “because most women’s experience and expertise with violence tends to be minimal, they are unlikely to engage in physical combat.”<sup>192</sup> He disclosed that the types of resistance most often employed by rape victims are verbal resistance

186. *Rusk*, 406 A.2d at 626.

187. Scheppel, *supra* note 47, at 2096.

188. *Id.* at 2095.

189. *Rusk*, 406 A.2d at 634 (Wilner, J., dissenting) (emphasis added).

190. *Id.* (emphasis added).

191. Scheppel, *supra* note 47, at 2095; *Rusk*, 406 A.2d at 634–635 (Wilner, J., dissenting).

192. *Rusk*, 406 A.2d at 634 (Wilner, J., dissenting) (quoting FED. BUREAU OF INVESTIGATIONS, 2 THE UNIFORM CRIME REPORTS, at 4 (1978)).



and other forms of passive resistance, such as “crying, being slow to respond, feigning an inability to understand instructions or telling the rapist they are pregnant, diseased or injured.”<sup>193</sup> Finally, Judge Wilner pointed out that, of the 12% of women who fight their attackers, 71% of the victims were physically injured, with 40% requiring hospitalization or medical treatment.<sup>194</sup> The judge recognized that “[t]hese results indicate one possible danger of the popular notion (and some [legal] requirements) that a victim of an attack should resist to her utmost.”<sup>195</sup> Although the wide-angle view of the case presented by Judge Wilner “puts the events before the court in a broader context than that normally invoked by legal narratives,”<sup>196</sup> this context allowed the audience to better understand Pat’s reactions and to feel more sympathy for her than did the majority’s story, which primarily focused on the events on the night of the rape.

2. Ze’ev v. State of Israel<sup>197</sup>

Ze’ev was a Jewish settler in Shilo, a settlement located in the Israeli-occupied West Bank.<sup>198</sup> He was a shepherd.<sup>199</sup> In 1988, Ze’ev was convicted of manslaughter for shooting and killing one Palestinian shepherd and wounding another in an incident that took place on the outskirts of Shilo.<sup>200</sup> The Palestinian shepherds had been unarmed.<sup>201</sup> On appeal, Ze’ev argued that he was justified in fearing aggression from the Palestinian shepherds and shooting so as to scare away “what he reasonably perceived to be a threat to his home.”<sup>202</sup> Additionally, Ze’ev argued that, prior to opening fire, he had shouted at the Palestinian shepherds to go away and that they had responded by cursing at him and moving in his direction.<sup>203</sup>

193. Scheppel, *supra* note 47, at 2095; Rusk, 406 A.2d at 634 (Wilner, J., dissenting).

194. Rusk, 406 A.2d at 634 (Wilner, J., dissenting).

195. *Id.*

196. Scheppel, *supra* note 47, at 2096.

197. CrimA 26/89 Ze’ev v. State of Israel 43(4) PD 631 [1989] (Isr.). The author has been unable to obtain a copy of the Ze’ev opinion. Therefore, in her discussion of Ze’ev, she has relied on Jonathan Yovel’s description of the case in his article titled *Running Backs, Wolves, and Other Fatalities: How Manipulations of Narrative Coherence in Legal Opinions Marginalize Violent Death*. See generally Yovel, *supra* note 12.

198. Yovel, *supra* note 12, at 132.

199. *Id.* As ironic as it may be, Ze’ev translates in Yiddish to “wolf.” *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

The majority opinion is a lesson in narrative coherence. It focuses narrowly on the “trouble” between Ze’ev and the two Palestinian shepherds. It reconstructs the immediate events leading to the shooting,<sup>204</sup> examining the “internal sequential arrangement of the” story.<sup>205</sup> The majority relied on expert ballistic evidence in concluding that Ze’ev, “in order to have fired the good many rounds that he in fact did, began shooting immediately, taking no precautionary steps.”<sup>206</sup> The court reasoned that, based on Ze’ev’s “own account, the very short time span between first contact and the shooting—less than a minute—could not have allowed for the preliminary steps he claimed to have taken, such as shouting warnings, firing in the air, etc.”<sup>207</sup> The majority’s decision “focuses on the narrative’s internal integrity,”<sup>208</sup> evaluating its temporal unity and coming to a decision based on “widely-shared assumptions about how the material worlds work,” particularly with regard to the passage of time and the sequencing of events.<sup>209</sup> The majority found Ze’ev’s version of events to lack temporal unity—and thus plausibility—because the events could not have occurred the way he said they did based on the short period of time that had passed between Ze’ev’s first encounter with the Palestinians and when he shot them.

The dissenting justice, on the other hand, did not narrowly focus on the trouble between Ze’ev and the Palestinian shepherds.<sup>210</sup> Rather, the dissenting justice put the shooting in a broader context by providing a more panoramic opening shot of the social landscape in which this particular shooting took place.<sup>211</sup> The minority opinion told “the story of a secluded settlement populated by infants and women and vacant of most of its men amidst a vast, menacing periphery.”<sup>212</sup> It “cite[s] several security threats and official notices to that effect.”<sup>213</sup> It goes on to present evidence of Ze’ev’s “generally mild character” and accepts his assertion that he attempted to drive the Palestinians

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204. *Id.*

205. *Id.* at 131.

206. *Id.* at 132.

207. *Id.*

208. *Id.* at 136.

209. *Id.* at 132.

210. *See id.* at 132–33.

211. *See id.*

212. *Id.* at 132.

213. *Id.* at 132–33.

away verbally and by shooting into the air before he shot in their direction.<sup>214</sup>

Though the additional facts about the settlement being secluded and populated by women and children, the existence of many security threats, and Ze'ev's character are irrelevant in terms of the immediate events surrounding the shooting, these facts are useful with regard to the dissent's creation of a context that is recognizable to the audience. While the dissent does not indicate that Ze'ev was aware of the existence of the security threats,<sup>215</sup> his lack of knowledge is not important. The seclusion of the settlement and the existence of the threats are important for a few reasons. First, this context creates sympathy for Ze'ev and the situation in which he found himself (confronted by two potentially hostile Arabs in the outskirts of a secluded Israeli settlement). Second, it allows the audience to feel the "sense of urgency and anxiety" that Ze'ev presumably felt when confronted by two Palestinians outside Shilo.<sup>216</sup> Finally, and most important, the dissenting justice's "reconstruction of events . . . uses [narrative correspondence] to weave a story of its own."<sup>217</sup> The broader social context offered by the dissenting justice and the reconstructed facts create a setting for the story of the shooting that corresponds with an inherent knowledge structure with which most Israelis are familiar—the myth of Tel-Hai.<sup>218</sup>

The Tel-Hai story is a myth of Zionism that imparts a moral—"beware the seemingly innocuous stranger approaching a secluded dwelling, especially if the former is an Arab and the latter Israeli."<sup>219</sup> The Tel-Hai myth tells of a secluded Galilee stronghold that was attacked by Arabs who had initially pretended to be peaceful and so were admitted to the stronghold.<sup>220</sup> The Arabs then assaulted and destroyed the stronghold, killing eight military men and women who defended it.<sup>221</sup> Much like the United States' defeat at The Alamo, the military defeat and political situation that followed the Tel-Hai attack had a solidifying effect, causing Israelis to identify with one another

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214. *Id.*

215. *Id.* at 133.

216. *Id.* The dissenting justice manages to omit Ze'ev admission that he did not feel fear when he saw the Palestinians. *Id.*

217. *Id.*

218. *See id.* at 133–36.

219. *Id.* at 134.

220. *Id.*

221. *Id.*

and unite as one people.<sup>222</sup> The Tel-Hai myth “became an interpretive key for [Israelis to use when evaluating] future experience, transcending” history.<sup>223</sup>

The story the dissenting justice tells fits closely with the Tel-Hai myth.<sup>224</sup> While the Tel-Hai myth is never explicitly mentioned in the minority opinion,<sup>225</sup> the dissenting justice’s “tacit invocation of [the Tel-Hai myth] underlies his story of the Ze’ev shooting.”<sup>226</sup> In fact, “[t]he minority opinion in *Ze’ev* owes much of its persuasiveness to reliance on [the] tacit invocation of Tel-Hai as a mythical parable—but only among” those members of the audience who share cultural knowledge of the myth.<sup>227</sup> Members of the audience who share cultural knowledge of the myth “are expected to perform the associative link from the narrative pattern to several ‘baits’ or ‘anchors,’ thus realizing what the story in *Ze’ev* is really all about.”<sup>228</sup> These baits or anchors were the dissenting justice’s emphasis on how secluded Shilo was, the numerous security threats that existed at the time of the shooting, and “the menace emanating from the victims rather than from the perpetrator.”<sup>229</sup> These facts invoke, without explicitly referencing, stories of Arab aggressors invading secluded Israeli communities, specifically the Tel-Hai myth.<sup>230</sup> The implicit invocation of the myth supplies the *Ze’ev* case “with meaning in a manner powerful enough to preempt other factual findings,”<sup>231</sup> particularly those with regard to the extremely short period of time that elapsed between Ze’ev’s initial encounter with the Palestinians and his shooting in their direction. This is due to the fact that “most

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222. *Id.* at 133, 135. “Gettysburg,” “Pearl Harbor,” “D-Day,” and “September 11th” (or “9/11”) are other American examples of “code-names” like The Alamo that instantly bring to mind “commonly shared stories of bloody events” that have become “the myths that constitute and solidify collective identity.” *Id.* at 133. Like the Tel-Hai story, these myths also impart a moral less. *Id.* at 134. For instance, “in American consciousness, Pearl Harbor would function as an instant invocation of the traitorous belligerence of foreigners and an imperative justification for righteous aggression no matter its precise historiography.” *Id.*

223. *Id.* In fact, the Tel-Hai attack has become so mythologized that “Israeli schoolchildren are sometimes surprised to find out that the place Tel-Hai actually exists.” *Id.*

224. *Id.* at 135.

225. *Id.*

226. *Id.* at 134.

227. *Id.* at 135.

228. *Id.*

229. *Id.* at 133.

230. *Id.*

231. *Id.* at 135.

of the [audience], though decidedly not all, would share the common-sensical knowledge of what happens when menacing strangers emerge from those unknown stretches beyond civilization [and approach] a secluded dwelling.”<sup>232</sup> However, those members of the audience who do not share the Tel-Hai myth, outsiders like the Palestinian victims in this case, “would be perplexed by the causation implied by the minority’s story, because that relies on cultural expectations coded in mythical patterns that they do not share and that are not spelled out in the narrative itself.”<sup>233</sup>

“[T]he minority opinion in *Ze’ev* is replete with historical and mythological layers” that form a context that is much more expansive than that provided by the majority opinion.<sup>234</sup> But, though these references are purposeful and proactive, they are not explicit. The dissenting judge does not explicitly reference Tel-Hai because he does not wish to engage the audience in a dialogue about the myth and the applicability of its moral lesson in *Ze’ev*.<sup>235</sup> The dissenting judge does not provide “an opportunity for reflection or exchange. . . . [Rather,] [t]he reader is counted on to form certain responses” as a result of the minority opinion’s implicit allusions to the Tel-Hai myth.<sup>236</sup> “The majority opinion [on the other hand,] does not neglect context.”<sup>237</sup> It just narrows the context in which the shooting occurred to that which *immediately* surrounded the shooting rather than focusing on a broader context that allowed for the manipulation of the facts. “To an extent, the majority employed a formalistic approach, signifying that no amount of importation of—or reliance on—external cultural input may change its . . . approach to facticity.”<sup>238</sup> The bald facts demonstrated that the events could not have occurred the way *Ze’ev* claimed they occurred. The majority recognized that *Ze’ev*’s story lacked temporal unity and did not allow a broader view of society in the West Bank to affect or alter its view of the bald facts. Consequently, the majority and minority opinions each provided a comprehensive account of what happened during the shooting. However, the stories that the majority and minority opinions told varied widely due to the justices emphasizing different aspects of narrative rationality. Because the majority opinion

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232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.* at 135–36.

237. *Id.* at 136.

238. *Id.*

emphasized narrative coherence, and focused on the internal consistency of the elements of the story and temporal unity, it concluded that Ze'ev had committed manslaughter. The minority opinion, on the other hand, emphasized narrative correspondence, linking Ze'ev's story with the moral lessons imparted by the Tel-Hai myth. These lessons provided Ze'ev "with a probable expectation of aggression" from the Palestinian shepherds and "preempt[ed] responsibility" for his shooting the Palestinians and killing one of them.<sup>239</sup>

### 3. Summary

The *Rusk* and *Ze'ev* cases demonstrate that a lawyer can manipulate narrative coherence and narrative correspondence to tell extremely different stories based on the same set of facts. A focus on narrative coherence emphasizes the immediate facts that lead to the litigation. It underscores the need not only for the facts to match up with one another, but also for the parts of the story to fit together. When the facts match up and the parts of the story fit together, the story seems plausible. On the other hand, a focus on narrative correspondence broadens the social context in which the immediate facts are situated. This may be done to assist an insider audience in comprehending an outsider's actions. It may also be done to tap into embedded knowledge structures that the insider audience shares in an effort to avoid a problem with the narrative coherence of a story. Such problems would include when the client's claimed facts are not plausible because they do not entirely match up.

The *Rusk* case illustrates how a wide angle approach to the context in which a case arises might work to the advantage of outsiders. "[T]he claims of outsiders are often not heard in law because the experiences and reactions and beliefs and values that outsiders bring to the law are not easily processed in the traditional structures of legal narratives."<sup>240</sup> By offering the legal audience a broader context in which to evaluate the events of the case, however, a lawyer may provide the audience with sufficient information to understand why an outsider acted in a different manner than how the insider audience would have acted.<sup>241</sup> Thus, emphasizing narrative correspondence over narrative coherence can sometimes be an effective technique when a lawyer represents an outsider whose

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239. *Id.*

240. Scheppel, *supra* note 47, at 2097.

241. *Id.* at 2096.

actions may not be readily comprehensible by a white, middle-class audience.

A panoramic view of the social context in which a case arises, which emphasizes narrative correspondence, “may not always . . . work to the advantage of outsiders.”<sup>242</sup> The minority opinion in *Ze’ev* provides an example where the focus on narrative coherence benefited the insider party rather than the victims, who were outsiders. The provision of a broader social context was used in the minority opinion to circumvent the *facts* because *Ze’ev*’s story lacked internal consistency with regard to the passage of time and the sequence of events. This lack of consistency led the majority to conclude that *Ze’ev* was unjustified in his shooting of the Palestinians and to convict him of manslaughter. The minority opinion, on the other hand, tacitly appealed to a stock story that supported *Ze’ev*’s expectation of aggression from the Palestinians and excused him from shooting them. The dissenting justice buried argument in the expanded contextual facts that were supplied and circumvented the restraints on the meaning that were given to the bald facts as they existed.<sup>243</sup>

**B. Drawing on Narrative Fidelity to Create Conflict Between the Client’s Character and Audience Expectation Regarding How Story Should End**

Narrative coherence demands that the various elements of a story work together for a story to be persuasive. These elements include character, conflict, plot, point of view, setting, theme, voice, and style.<sup>244</sup> Characters, arguably the most important element of a story,<sup>245</sup> are “free agents, with minds of their own . . . who engage in the ‘what happened and why’ of the story.”<sup>246</sup> Stock stories cast people, institutions, and ideas as characters, each filling a particular archetypal role.<sup>247</sup> Accordingly, characters function as “trope[s] for human identity.”<sup>248</sup> When a particular stock story is triggered, the audience expects to encounter a stock of characters, including heroes,

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242. *Id.* at 2096–97.

243. *See* Lopez, *supra* note 1, at 33.

244. Sheppard, *supra* note 1, at 268; *see* Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 127, 137 (2008); J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Fact Sections*, 32 RUTGERS L.J. 459, 466 (2001).

245. Sheppard, *supra* note 1, at 274. *See* Chestek, *supra* note 244, at 142.

246. Carolyn Grose, *Storytelling across the Curriculum: From Margin to Center, from Clinic to the Classroom*, 7 J. ASS’N. LEGAL WRITING DIRECTORS 37, 43 (2010).

247. Sheppard, *supra* note 1, at 187; Edwards, *supra* note 33, at 890.

248. Grose, *supra* note 246, at 43.

villains, tricksters, mentors, kings, mothers, demons, sages, children, companions, gatekeepers, damsels in distress, shape shifters, and clowns.<sup>249</sup> And, just as with “plots, characters tend to register with [an audience] as familiar, each one is expected to embody one or more general truths”<sup>250</sup> about people in general or the world.

“Although stock stories may cast people, institutions, and ideas in archetypal roles that serve as templates for characters, the lawyer still needs to develop those characters so that they seem true to the reader rather than a two-dimensional cardboard cutout.”<sup>251</sup> To achieve narrative coherence, and ultimately narrative rationality, the litigants must “emerge as fully realized individuals . . . rather than cardboard prototypes.”<sup>252</sup> Consequently, the characters need to be developed so that they feel real to the audience.<sup>253</sup>

Character can be developed in numerous ways. It can be established directly by revealing an individual’s thoughts, needs, dreams, fears, weaknesses, experiences, circumstances, and motivations.<sup>254</sup> Character can also be demonstrated by “describing [an individual’s] physical ‘appearance, clothes, possessions, body language, etc., which act as indices of class, character, status, and social milieu.’”<sup>255</sup> Character can be developed indirectly as well.<sup>256</sup> It can be developed indirectly through action and dialogue.<sup>257</sup> For instance, how an individual responds to a conflict or struggles to overcome adversity reveals something about his or her character.<sup>258</sup> This is true with regard to what the individual says as well.<sup>259</sup> However, though it is important to develop a character, when

249. Sheppard, *supra* note 1, at 275; Edwards, *supra* note 33, at 890; *see also* Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client’s Story Using the Characters and Paradigm of the Archetypal Hero’s Journey*, 29 SEATTLE U. L. REV. 767, 775, 778 (2006).

250. Grose, *supra* note 246, at 43.

251. Sheppard, *supra* note 1, at 276.

252. Fagans & Falk, *supra* note 9, at 23.

253. *Id.* at 30.

254. *Id.* at 30–31.

255. *Id.* at 31. With regard to descriptions of body language, “there is a difference between persons making eye contact and a person becoming aware that he or she is the object of someone’s unblinking stare. The former suggests a moment of shared intimacy, the latter an uncomfortable intrusion.” *Id.*

256. *Id.*

257. *Id.*

258. Sheppard, *supra* note 1, at 275; Foley & Robbins, *supra* note 244, at 470.

259. Fagans & Falk, *supra* note 9, at 31. That dialogue is a good measure of character is demonstrated by the ancient Greek adage, “Speak, so that I may see you.” *Id.*



engaged in character development, a lawyer should avoid information overload.<sup>260</sup> Rather,

character can be developed economically and elegantly through use of selected details . . . Effective characterization captures appropriate details in images, or in careful descriptions, often through the selection of vivid details. These enable the reader to pull the pieces together into a composition—to construct the whole from the closely observed details, and thus, to compose the character's character.<sup>261</sup>

Furthermore, an audience can deduce more than just who an individual is from his or her character. An audience can deduce why a character has acted in a particular fashion and predict how that individual is likely to act in future circumstances. An audience can deduce why a character has acted in a particular manner by figuring out the character's motivations. This provides an explanation for what has already happened in the story.<sup>262</sup> Additionally, character can foreshadow what will happen next.<sup>263</sup> The audience will be able to explain what has already happened and predict what will happen by “draw[ing] upon . . . stock stories, metaphors, and psychological schema to look forward as well as to look back into the past.”<sup>264</sup>

Recall that narrative coherence requires that the facts and the client's story match up.<sup>265</sup> What this means is, with regard to character, narrative coherence demands that an individual act consistently with his or her character.<sup>266</sup> Thus, for narrative coherence to exist, the character of the individual and the conduct that individual engages in must comport with each other.<sup>267</sup> The individual must conduct him or herself in a manner consistent with his or her character in order for narrative coherence to exist. For example, if villains suddenly profess to be heroes, “we need a lot of persuasive

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260. See Philip N. Meyer, *Vignettes from a Narrative Primer*, 12 LEGAL WRITING: J. LEGAL WRITING INST. 229, 263 (2006). According to Meyer, “an overload of psychological description and the baggage of too many identifying details may detract from effective characterization, especially in legal narratives.” *Id.*

261. *Id.*

262. *Id.* at 264.

263. *Id.*

264. *Id.*

265. Fagans & Falk, *supra* note 9, at 33.

266. Johansen, *This Is Not the Whole Truth*, *supra* note 5, at 981.

267. Fagans & Falk, *supra* note 9, at 33, 36.

sub-plots about their lives to explain the transformation.”<sup>268</sup> If such subplots are missing, the villain’s behavior does not make sense, the story is not believable, and its persuasive effect falls apart.

When dealing with a stock story that has a resolution that does not favor his or her client, a lawyer may be able to use the need for narrative coherence with regard to character, the character’s conduct, and the resolution of the story to the client’s benefit. By carefully developing the character of his or her client in a way that creates friction between *who the character is* and *how the character is expected to act* according to the stock story, a lawyer may be able to change the traditional resolution of the stock story that was triggered into one that is more favorable to the client. In order to change the outcome of the story in a manner that is plausible, the lawyer must develop the character of the client in a way that makes the new, unexpected behavior more believable than the behavior originally suggested by the stock story because it is more consistent with the character’s personality. The lawyer would need to demonstrate that this was the only plausible course of action she could take given who the client is. There was nothing else the client could do—any other action would have been counter to whom and what she is. Thus, a lawyer must develop the client’s character in such a way that the outcome the lawyer is seeking seems more natural than that associated with the stock story simply because of who the party is and how the party would act.

Below is an example of how character development and narrative fidelity can be used to circumvent the negative assumptions and outcomes associated with a stock story. In the television series *Buffy the Vampire Slayer*,<sup>269</sup> the main character, Buffy Summer, fights Dracula in an episode titled *Buffy vs. Dracula*.<sup>270</sup> Since the episode occurred at the beginning of season five, the creator of the series needed to find a way for the show to follow the Dracula storyline without Buffy becoming a vampire. Furthermore, the creator of the show needed to do this in a way that was true to the “Buffyverse.”<sup>271</sup> Following the discussion of *Buffy vs. Dracula*,<sup>272</sup> this section explores

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268. Johansen, *This is Not the Whole Truth*, *supra* note 5, at 981.

269. *Buffy the Vampire Slayer* (Mutant Enemy television broadcast 1997–2003).

270. *Buffy the Vampire Slayer: Buffy vs. Dracula* (Mutant Enemy television broadcast Sept. 26, 2000).

271. *Buffyverse*, WIKIPEDIA (Sept. 20, 2011), <http://en.wikipedia.org/wiki/Buffyverse>. The Buffyverse, also known as the “Whedonverse” or “Slayerverse,” is the fictional universe in which the television series *Buffy the Vampire Slayer* is set. *Id.*

272. *Buffy the Vampire Slayer: Buffy versus Dracula*, *supra* note 270.

appealing to narrative fidelity by creating friction between the character of a client who is a battered woman and the negative assumptions and beliefs associated with being a battered woman in order to make a more favorable outcome seem natural.

1. *Buffy vs. Dracula*<sup>273</sup>

Most members of Western society are familiar with Bram Stoker's novel *Dracula*.<sup>274</sup> We know generally what details to expect when we see a remake or loose adaptation of the story. The general plot line involves Dracula, a vampire, seducing women and turning them into vampires. Because he puts them under his thrall, his female victims do not resist his efforts but cooperate willingly. Dracula's female victims try to hide what has happened to them from their loved ones. His victims willingly go to Dracula when he wants them. When he seduces Mina Harker and begins her transformation into a vampire, VanHelsing, an older gentleman with knowledge of the occult, and Jonathan Harker, Mina's husband, fight and kill Dracula to save Mina.<sup>275</sup>

In fact, the *Dracula* story is so ingrained in our culture that even when a story features vampires, whether they are Dracula or not, we know what to expect. Dracula serves as a myth, or cognitive short cut, regarding vampires. We know that vampires drink blood; they only come out at night; they tend to travel in a crate or other coffin-like container filled with their native soil; they have special powers that allow them to turn into a bat, wolf, or mist, and to hold their victims in thrall so the victim will cooperate with them; they sometimes transform their victims into vampires; and they can be killed by staking them through the heart.

Buffy the Vampire Slayer was a television series that ran from 1997 to 2003.<sup>276</sup> The main character was Buffy Summers, a petite blond young woman who, at first glance, seemed like any other teenager. She liked to shop, date boys, and hang out with her friends. But Buffy had a secret. She was the "chosen one." She was the one girl in all the world who had been chosen to fight vampires and other forces of darkness. She was more than "just a girl." She possessed a mystical power that made her faster, stronger than other people. She was the slayer.

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273. *Id.*

274. BRAM STOKER, *DRACULA* (1897).

275. *Id.*

276. *Buffy the Vampire Slayer*, *supra* note 269.

Throughout the series, Buffy was portrayed as a physically and emotionally strong, smart, witty, independent young woman who took her responsibilities as the slayer seriously. She repeatedly saves her classmates, her teachers, her mother, her friends, her boyfriends, and even the world from vampires and demons. And, as is inevitable for a vampire slayer, she encounters Dracula in an episode in season five titled *Buffy vs. Dracula*.<sup>277</sup>

a. Synopsis of the Episode<sup>278</sup>

The episode begins by showing Buffy lying in bed with her boyfriend, Riley Finn. Unable to sleep, Buffy quietly gets out of bed and goes out to patrol the cemetery.<sup>279</sup> After staking a vampire, she returns to bed with Riley.<sup>280</sup> The next day, Buffy and her friends are enjoying a day at the beach until Willow, a witch-in-training, manipulates the elements to magically ignite the barbecue.<sup>281</sup> A sudden thunderstorm erupts, forcing them to seek shelter from the rain.<sup>282</sup> Willow objects that she did not cause the storm.<sup>283</sup> The scene then switches to two delivery men in front of a residence; they are unloading a large crate. One of the delivery men drops the end of the crate and it cracks open a bit, expelling dirt. The man says, "Look at this. The guy's carting dirt around! Dirt. Man, rich people are . . .",<sup>284</sup> His words are cut short when a clawed hand breaks through the wood and attacks him. The scene fades away as the hand starts toward the other delivery man.

The next time we see Buffy, she is back in the cemetery fighting another vampire.<sup>285</sup> The fight is a lively one. A man with dark eyes materializes from mist, watching Buffy and the anonymous vampire fight from a distance.<sup>286</sup> Buffy stakes the vampire.<sup>287</sup> As she struts away, clearly pleased with herself, she slows down and looks around.

277. *Buffy the Vampire Slayer: Buffy versus Dracula*, *supra* note 270.

278. Some parts of the episode have been omitted from this synopsis. This synopsis only focuses on the parts of the episode that either correspond with the Dracula story line or develop Buffy's character. Extraneous materials have been ignored.

279. *Buffy the Vampire Slayer: Buffy versus Dracula*, *supra* note 270, at 00:01–00:25.

280. *Id.* at 00:26–1:20.

281. *Id.* at 02:15–3:25.

282. *Id.* at 3:27–3:49.

283. *Id.* at 3:40.

284. *Id.* at 3:50–4:21.

285. *Id.* at 4:24–4:26.

286. *Id.* at 7:24–7:55.

287. *Id.* at 7:56–7:58.

The man says to her, “Very impressive hunt. Such power.”<sup>288</sup> Buffy responds, “That was no hunt. That was just another day on the job. Care to step up for some overtime?”<sup>289</sup> The man, who has long dark hair and wears a black cape that is red on the inside, tells her, “We are not going to fight.”<sup>290</sup> Buffy replies, “Do you know what a slayer is?”<sup>291</sup> The man responds, “Do you?”<sup>292</sup> “Who are you?”<sup>293</sup> Buffy demands. He answers, “I apologize. I assumed you knew. I’m Dracula.”<sup>294</sup> Buffy exclaims, “Get out!”<sup>295</sup> The scene then switches to the credits.

When we return from the credits, Willow and Xander, Buffy’s stalwart companions, are walking through the cemetery chatting. Xander asks Willow if she wants “to see if Buffy’s hanging around the headstones?”<sup>296</sup> The scene returns to Buffy and Dracula. Buffy is saying, “So let me get this straight. You’re Dracula. *The* guy, the count?”<sup>297</sup> He responds, “I am.”<sup>298</sup> She mocks him, “And you’re sure this isn’t just some fan boy thing? ‘Cause I’ve fought more than a couple pimply overweight vamps who called themselves Lestat.”<sup>299</sup> Dracula tells her that she knows who he is just as he knows who she is. When she expresses surprise, Dracula informs Buffy that she is known throughout the world. He states that he came to Sunnydale to meet “the renowned killer.” Buffy expresses her displeasure, explaining that she prefers “the term slayer.” She reminds Dracula that she’s the good guy. He responds, “Perhaps, but your power is rooted in darkness. You must feel it.” Buffy replies, “No. You know what I feel? Bored.”<sup>300</sup> She lunges forward to stake him in the heart. Dracula turns into mist and reappears behind her. When she tries to stake him a second time, Dracula again turns into mist. Buffy chides, “Okay, that’s cheating.”<sup>301</sup> As Buffy spins around, looking furtively for Dracula, Willow and Xander approach. Buffy tells them to get

288. *Id.* at 8:02–8:17.

289. *Id.* at 8:18–8:25.

290. *Id.* at 8:26–8:28.

291. *Id.* at 8:29–8:30.

292. *Id.* at 8:31–8:32.

293. *Id.* at 8:35–8:36.

294. *Id.* at 8:38–8:44.

295. *Id.* at 8:46–8:47.

296. *Id.* at 8:53–9:22.

297. *Id.* at 9:26–9:32.

298. *Id.* at 9:33–9:34.

299. *Id.* at 9:35–9:42.

300. *Id.* at 9:45–10:36.

301. *Id.* at 10:37–10:47.

out of there, but it is too late. She sees Dracula starting to materialize behind them and warns them. They turn around and see Dracula. Xander immediately starts mocking Dracula's attire and accent. Buffy intervenes, "Xander, I'm pretty sure that's Dracula."<sup>302</sup> Dracula declares, "This is not the time. I will see you soon."<sup>303</sup> He then turns into a bat and flies away.

The next time Dracula sees Buffy, he has entered her bedroom as mist. When he coalesces into a man, Buffy wakes up and sits up. After Dracula tells her that she is magnificent, Buffy replies, "I bet you say that before you bite all the girls." Dracula and Buffy exchange some words, then Dracula orders Buffy to pull her hair back. Buffy complies, but says, "This isn't how I usually fight. You think you can just waft in here with your music video wind and your hypno eyes." Dracula approaches her and sits next to her on her bed. He runs his finger over the scar on her neck and comments, "You have been tasted." Buffy will not look at Dracula, but says, "He was . . ." Dracula interrupts her, "Unworthy. He let you go. But the embrace, his bite, you remember."<sup>304</sup> When Buffy objects, Dracula orders, "Do not fight. I can feel your hunger." He then bites her neck. When Buffy wakes in the morning, she gets dressed. She is standing in front of a mirror looking at her reflection. When she pulls her hair back, she sees the puncture wounds from Dracula's fangs. She grabs a scarf and ties it around her neck to hide the marks.

Later, Buffy allows Xander, who has become a sort of Renfield-like character under Dracula's power, to lead her to Dracula's dwelling. When Buffy and Dracula meet, Dracula tells Buffy, "I knew you'd come."<sup>305</sup> Buffy asks, "Why? Because I'm under your thrall?"<sup>306</sup> She whips out a stake and says, "Well, guess again, pal!"<sup>307</sup> However, when Dracula orders her to put the stake down, she does so automatically. "Right," she says, "that was not you. I did that. I did that because I wanted to. Maybe I should rethink that thrall thing."<sup>308</sup> Dracula approaches her and Buffy tells him, "Stay away from me."<sup>309</sup> Dracula mocks her, "Are you afraid I will bite you? Slayer, that's

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302. *Id.* at 10:48–11:22.

303. *Id.* at 11:31–11:37.

304. *Id.* at 20:31–22:23.

305. *Id.* at 30:06–30:07.

306. *Id.* at 30:12–30:15.

307. *Id.* at 30:16–30:17.

308. *Id.* at 30:20–30:41.

309. *Id.* at 31:22–31:23.

why you came.”<sup>310</sup> Buffy objects, “No. Last night, it’s not going to happen again.”<sup>311</sup> “Stop me,” Dracula says, “Stake me.”<sup>312</sup> “Any minute now,” Buffy tells him, though not convincingly.<sup>313</sup> They exchange words and Buffy tells Dracula that her friends are there.<sup>314</sup> He acknowledges that they are present, but seems unconcerned about them. Dracula says, “You will have eternity to discover yourself. But first, a little taste.”<sup>315</sup> Buffy tells him, “I won’t let you.”<sup>316</sup> He looks meaningfully at her and says, “I didn’t mean for me.”<sup>317</sup> Rolling up his sleeve and slicing his wrist so that blood wells up out of it, Dracula says, “All those years fighting us, your powers so near to our own. And you’ve never once wanted to know what it is we fight for. Never even a taste.”<sup>318</sup> When Buffy voices concern about becoming a vampire if she drinks his blood, Dracula informs her that he had not drank enough of her blood for her to change.<sup>319</sup> He holds his wrist out to her. She takes it, puts her lips to his wrist, and begins to taste his blood. As she does this, he says to her, “Find it. The darkness. Find your true nature.”<sup>320</sup>

As she drinks Dracula’s blood, a montage of images flashes through Buffy’s mind. She sees several images of the first slayer, blood rushing through a vein, and many images of herself chasing and staking vampires. “Wow,” she says and knocks Dracula across the room, “that was gross.”<sup>321</sup> Dracula stands up and says, “You are resisting.”<sup>322</sup> “Looks like,” Buffy counters.<sup>323</sup> “Come here,” Dracula orders, “come to me.”<sup>324</sup> Buffy responds, “You know, I really think

310. *Id.* at 31:24–31:33.

311. *Id.* at 31:34–31:40.

312. *Id.* at 31:40–31:44.

313. *Id.* at 31:45–31:46.

314. *Buffy the Vampire Slayer: Buffy versus Dracula*, *supra* note 270, at 31:47–31:59.

315. Xander, who is under Dracula’s power, is eating bugs like the lunatic Renfield from the novel and trying to prevent Riley and Giles, Buffy’s watcher and teacher, from interfering with Dracula’s plan. *Id.* at 25:21–26:00. While searching the mansion, Giles falls into a pit with Dracula’s three sisters and seems to fall under their thrall, much like Jonathan Harker in the novel. *Id.* at 33:30–34:10.

316. *Id.* at 32:00–32:41.

317. *Id.* at 32:45–32:47.

318. *Id.* at 34:12–34:30.

319. *Id.* at 34:34–34:38.

320. *Id.* at 34:35–35:39.

321. *Id.* at 35:00–35:55.

322. *Id.* at 35:57–36:00.

323. *Id.* at 36:01–36:03.

324. *Id.* at 36:04–36:07.

the thrall has gone out of our relationship.”<sup>325</sup> Dracula demands, “What is this?”<sup>326</sup> Buffy answers, “My true nature. Want a taste?”<sup>327</sup> She and Dracula then begin to fight. Dracula turns into mist and begins to coalesce on the other side of the room. Buffy runs in that direction and grabs the stake she earlier laid on the table as she passes by. When Dracula takes form, Buffy stakes him through the heart and ask, “How do you like my darkness now?”<sup>328</sup> Dracula turns to dust as Riley, Xander, and Giles enter the room.

b. How Friction Between Buffy’s Character and Her Behavior  
Undermined the Stock Ending of the Dracula Story

From the scene in which Buffy is lying restlessly in bed with Riley to the scene when Dracula shifts into a bat,<sup>329</sup> the writer is establishing some necessary story elements. First, the writer is establishing the plotline of the episode by introducing Dracula and having him encounter Buffy. The plotline triggers the vampire myth as well as the more specific Dracula story line. When the delivery men unload the large crate at night during a storm, and dirt spills out of it when they drop it,<sup>330</sup> the audience knows what to expect even before the pale hand breaks through the wood.<sup>331</sup> Vampire! And when that vampire later identifies himself as Dracula,<sup>332</sup> just like Buffy, the audience begins to believe his claim when he turns into mist.<sup>333</sup> The belief that the vampire might be Dracula is reinforced when he later turns into a bat.<sup>334</sup>

The scene in the cemetery with Buffy and Dracula also makes the audience aware that Buffy is the woman who has attracted Dracula’s fancy; she is the one that he will seduce. A few scenes make this apparent. When Dracula first materializes in the cemetery, he admires Buffy from afar.<sup>335</sup> He also tells Buffy that he came to Sunnydale solely to meet her.<sup>336</sup> Additionally, when Willow and

325. *Id.* at 36:07–36:10.

326. *Id.* at 36:14–36:15.

327. *Id.* at 36:16–36:20.

328. *Id.* at 38:00–38:05.

329. *Id.* at 11:31–11:37.

330. *Id.* at 7:24–7:55.

331. *Id.*

332. *Id.* at 8:38–8:44.

333. *Id.* at 7:24–7:55.

334. *Id.* at 11:31–11:37.

335. *Id.* at 7:24–7:55.

336. *Id.* at 9:45–10:36.



Xander interrupt them, Dracula informs Buffy that he will see her later.<sup>337</sup> Dracula seems not only interested in Buffy but captivated by her.

The writer is also establishing Buffy's character. When the audience first sees Buffy, she is lying restlessly in bed beside her boyfriend.<sup>338</sup> She creeps quietly out of bed to go to on patrol in the cemetery, where she soon finds a vampire to fight and kill.<sup>339</sup> Buffy's fight with the vampire gives the audience the impression that this is not the first time she has engaged in such behavior. As Buffy battles the vampire, she demonstrates that she is a skilled fighter.<sup>340</sup> This fact is reinforced by her second fight with a vampire.<sup>341</sup> These fights, coupled with her friends later referring to Buffy as "she who hangs out in headstones,"<sup>342</sup> reinforce the idea that Buffy regularly hunts down vampires and slays them.

When Dracula introduces himself to Buffy, another side of her personality is revealed—her independent, sarcastic streak. Buffy does not just accept what some anonymous vampire tells her. When he tells her he is Dracula, she doubts he is who he says he is.<sup>343</sup> She challenges him with some snarky comments and tries to kill him like she would any other vampire.<sup>344</sup> It is not until he transforms into mist and rematerializes behind her that Buffy begins to suspect that this could be Dracula.<sup>345</sup> But he had to act like Dracula before she was willing to believe he might be Dracula.

In the next few scenes, from when Dracula materializes into Buffy's room to the point where he convinces her to taste his blood,<sup>346</sup> the writer is continuing to trigger the vampire myth and Dracula storyline. The writer accomplishes this by showing Dracula enter Buffy's bedroom as mist, put her under his thrall, and bite her.<sup>347</sup> The Dracula storyline continues to be triggered when Buffy hides the bite mark with a scarf and later goes willingly to Dracula's lair.<sup>348</sup>

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337. *Id.* at 11:31–11:37.

338. *Id.* at 00:26–1:20.

339. *Id.* at 4:24–4:26.

340. *Id.*

341. *Id.* at 10:37–10:47.

342. *Id.* at 8:53–9:22.

343. *Id.* at 20:31–22:23.

344. *Id.* at 20:31–22:23.

345. *Id.*

346. *Id.* at 30:06–30:07.

347. *Id.* at 20:31–22:23.

348. *Id.*

Dracula's seduction of Buffy, when he convinces her to taste his blood and to consider his offer of eternal life,<sup>349</sup> also furthers the vampire myth and stock story.

However, while the writer is continuing to trigger the vampire myth and Dracula storyline in these scenes, he is doing something else as well. The writer is creating friction between the stock story and the parallel story that he is telling with Dracula and Buffy. The new story fits well with the stock story; it is what the audience expects from a story that is based on the Dracula novel. But there is a problem. The way Buffy is acting is not consistent with who the audience knows her to be. Buffy does not cooperate with vampires. She does not just passively sit there and let them bite her! She fights them. She kills them. And she antagonizes them with snarky comments while she does it. Buffy herself acknowledges the disparity between her usual behavior and her response to Dracula when she tells Dracula that sitting there and letting him bite her is not usually how she fights.<sup>350</sup> Even Buffy seems confused by her behavior.

The writer makes the contradiction between Buffy's character and her behavior even more apparent in the scene when Buffy and Dracula interact after she has gone willingly to his lair. When Buffy whips out the stake,<sup>351</sup> it appears that she has found herself. It seems that she was not under Dracula's thrall, that she went willingly to him only because she had a plan to kill him. However, when Dracula orders her to put the stake down, and she obeys despite her own wishes,<sup>352</sup> the audience feels discomfort again. And this unease is only partially due to the situation in which Buffy now finds herself. Furthermore, when Dracula convinces Buffy to taste his blood, and she concedes,<sup>353</sup> the audience feels extremely uneasy. This isn't Buffy; Buffy would never consider becoming a vampire.

This audience response is precisely what the writer was going for. Despite knowing that the female always succumbs to Dracula's seduction and that that very outcome is what the audience inherently expects from a Dracula story, that outcome does not seem natural here. In fact, it seems weird because who Buffy is as a person. She would resist more. She would fight. She would kill Dracula, or at least try to. It is this contradiction, between the inherent outcome of

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349. *Id.* at 30:06–30:07.

350. *Id.* at 30:20–30:41.

351. *Id.*

352. *Id.*

353. *Id.* at 34:35–35:39.

the stock story and how *this story* should end, that creates the audience's discomfort. They do not mesh.

The final scenes, from Buffy tasting Dracula's blood to her male friends entering the room,<sup>354</sup> resolve not only the plotline but also the audience's unease. When Buffy tastes Dracula's blood and the images of the first slayer and Buffy killing vampires flash through her mind,<sup>355</sup> she remembers who she is. She remembers that she is strong. She remembers that she is not a meek woman who sits passively by letting men control her fate. She is the slayer. Then she begins to act like herself. When she knocks Dracula across the room and tells him that his blood is pretty gross,<sup>356</sup> that is how the audience would expect Buffy to act. When Buffy tells Dracula that the thrall has gone out of their relationship,<sup>357</sup> the audience applauds the return of Buffy's snarky side. And when Buffy finally stakes Dracula,<sup>358</sup> the audience is satisfied.

The audience is satisfied because that is how *this* story would end. Buffy's character demands this outcome. It would not be believable for Buffy to succumb to Dracula's seduction or for the men in her life to have to save her from Dracula. Buffy is not saved by men; she saves them. The friction that the audience felt between the Dracula framework and parallel story has disappeared. It disappeared because Buffy finally behaved as the audience expected her to and the story ended in a way that seemed natural given her character.

The writer has deviated from the embedded knowledge structure created by the Dracula storyline in a way that is not only plausible, but in a way that his resolution of the events seems like the only natural ending to the story. The outcome associated with the Dracula plotline, where the female succumbs to Dracula and has to be rescued by her husband and an aged gentleman with knowledge of vampires, is made to seem strange in light of the fact that the female is Buffy Summers. This new ending for the parallel story not only comports with who Buffy is, but it also remains consistent with the more general vampire myth.

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354. *Id.* at 38:00–38:05.

355. *Id.* at 35:00–35:55.

356. *Id.*

357. *Id.* at 36:07–36:10.

358. *Id.* at 38:00–38:05.

2. *Re-characterizing Battered Women as Individuals Involved in a Power Struggle with Their Batterers Rather Than as Victims of “Learned Helplessness” in Child Custody Cases*

A small number of highly publicized cases where women have asserted the battered woman syndrome as a defense when accused of killing their batterer have shaped and informed cultural images of battered women.<sup>359</sup> These cultural images of battered women and the related assumptions about domestic violence have, in turn, affected the substantive law in ways that shape society’s perceptions of women.<sup>360</sup> The “learned helplessness” phenomenon has been critical to the success of women asserting the battered woman defense.<sup>361</sup> Learned helplessness is a psychological state where an individual feels powerless to change her situation.<sup>362</sup> This psychological state generally arises in response to persistent traumatic events, such as domestic violence.<sup>363</sup> Individuals suffering from learned helplessness have learned to behave passively and submissively, even when presented with an opportunity to help herself.<sup>364</sup>

While the concept of learned helplessness has been instrumental to the success of women asserting the battered woman defense, it has been harmful to society’s perception of battered women.<sup>365</sup> Learned helplessness has contributed to a perception that battered women are “pathologically weak, that is, too helpless or dysfunctional to” take more rationale steps to save themselves.<sup>366</sup> This image of battered women as pathologically weak and dysfunctional “has disserved battered women in other legal contexts, such as child custody.”<sup>367</sup> The image of battered women as pathologically weak and dysfunctional reduces the psychological complexity of the battered woman.<sup>368</sup> A

359. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 2–3 (1991); Kathryn Abrams, *Hearing the Call of Stories*, 79 CALIF. L. REV. 971, 988 (1991).

360. Mahoney, *supra* note 359, at 2; Abrams, *supra* note 359, at 988.

361. Mahoney, *supra* note 359, at 2; Abrams, *supra* note 359, at 988.

362. See LENOREE WALKER, *THE BATTERED WOMAN SYNDROME* 47–48 (1979); Abrams, *supra* note 359, at 988 n.63.

363. WALKER, *supra* note 362, at 47–48; Abrams, *supra* note 359, at 988 n.63.

364. WALKER, *supra* note 362, at 47–48; Abrams, *supra* note 359, at 988 n.63. It often seems to those hearing the stories of battered women that they were not as helpless as they perceived themselves to be. WALKER, *supra* note 362, at 47–48. The battered woman’s behavior, however, was determined by her cognitive mindset, not from what she actually could or could not do. *Id.*

365. Abrams, *supra* note 359, at 988.

366. *Id.*; Mahoney, *supra* note 359, at 4.

367. Abrams, *supra* note 359, at 988; Mahoney, *supra* note 359, at 4.

368. Abrams, *supra* note 359, at 988 n.65; Mahoney, *supra* note 359, at 38.

battered woman may be alternatively competent and forceful or passive and submissive depending on the coercion to which she is exposed.<sup>369</sup> However, the concept of learned helplessness has molded society's perception of the battered woman into one that denies the competent, forceful side of the battered woman. If the battered woman is weak and passive in the context of domestic violence, she must be weak and passive in all aspects of her life.

The image of battered women as pathologically weak and dysfunctional has also hindered the social response to domestic violence.<sup>370</sup> It has hindered the social response to domestic violence because it "fuels a potent social tendency toward denial of battery in our society,"<sup>371</sup> which causes some women to refrain from reporting domestic violence.<sup>372</sup> As a result, society underestimates the prevalence of domestic violence and leads those members of society who are not in a battering relationship to perceive battered women "as substantially different from themselves."<sup>373</sup>

When representing a battered woman in a context other than a criminal trial for killing her batterer, a lawyer may struggle against society's perception of battered women. For instance, in a child custody case, the image of a battered woman as weak and passive may impact the custody decision. This is because society will assume that if the battered woman suffers from learned helplessness, she must be weak and passive in all aspects of her life. If the child is unruly or if someone has alleged that the woman's partner is abusive of the child, then the common perception of battered women as weak will haunt the client. Under circumstances where the child is unruly, a mother who is also a battered woman will be viewed as too passive and weak to take charge of the child and discipline him or her. Similarly, in a situation where there are allegations that her partner is abusing her child, the woman will again be seen as too weak to defend the child or as too helpless to take the child and leave her batterer.

However, if the lawyer were to develop a more nuanced portrait of his or her client, the lawyer could create friction between 1) the way the legal audience would expect the client to act as a battered woman and the assumed outcome of the situation and 2) the character of the client. In developing a more nuanced portrait of the

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369. Abrams, *supra* note 359, at 988 n.65; Mahoney, *supra* note 359, at 30.

370. Mahoney, *supra* note 359, at 3; Abrams, *supra* note 359, at 988.

371. Abrams, *supra* note 359, at 988 n.65.

372. *Id.*; Mahoney, *supra* note 359, at 3.

373. Abrams, *supra* note 359, at 988 n.65; Mahoney, *supra* note 359, at 3, 5.

client, a lawyer would characterize the client as generally strong and competent, rather than weak and submissive. How would a lawyer do this given the social view of domestic violence? First, a lawyer could depict “the battering relationship as a struggle for power and control,”<sup>374</sup> with his client being one partner in such a relationship.<sup>375</sup> The lawyer could establish that, rather than being weak and submissive, his client (and implicitly those like her) was battered when she was exercising too much power and authority.<sup>376</sup> Her partner had to put her in check, and he accomplished this by abusing her. The lawyer could go on to support this characterization of the battered woman as strong by demonstrating that his client is competent and forceful in other areas of her life, such as at work or school or when parenting.

By presenting the client as strong and capable and the battering relationship as a power struggle, the lawyer may create friction between how the legal audience inherently expects battered women to act and how it would expect *this battered woman* to act. Furthermore, the manner in which the legal audience would expect the lawyer’s generally strong and competent client to act would suggest an entirely different outcome than that indicated by the common view of battered women. The audience would not predict that this woman would be an ineffective parent due to her helplessness and passivity. On the contrary, it would predict that she would do all in her power to be an effective parent because she is strong and exercises her power when needed.

## V. Conclusion

In summary, because stock stories shape how a legal audience thinks about and evaluates a given situation, lawyers must be aware of the negative stock stories that may be triggered by the facts of their clients’ cases. Lawyers must also be aware of the tools that are at their disposal when their clients do not fall comfortably within the confines of a stock story. One tool that a lawyer can use to circumvent the negative effects of a stock story is accentuating either narrative coherence or correspondence. By manipulating these threads of narrative rationality, a lawyer can tell very different stories. When emphasizing narrative coherence, a lawyer will narrowly focus on the facts leading to the trouble and on tying all the elements of the

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374. Abrams, *supra* note 359, at 988; Mahoney, *supra* note 359, at 43.

375. Abrams, *supra* note 359, at 989.

376. Mahoney, *supra* note 359, at 39; Abrams, *supra* note 359, at 991.

story together so that it is plausible. When stressing narrative coherence, on the other hand, a lawyer will map a cultural myth or stock story onto the client's case in order to appeal to its persuasive power. A lawyer can map a myth onto his client's case by opening the lens to offer a broader view of the case that alludes to the myth.

Another tool that a lawyer can use to circumvent the negative effects of a stock story or myth is creating a conflict between the client's character and the inherent expectations regarding how the course of events should unfold and how the story should end. By creating this friction, a lawyer can make a new conclusion seem more natural than that associated with the stock story or myth. Thus, the lawyer uses the contradiction to appeal to the persuasive power of narrative fidelity. These tools will allow a lawyer to avoid the negative effects of a stock story or myth.